UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JINO KURIAKOSE, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. FEDERAL HOME LOAN MORTGAGE CORPORATION, RICHARD SYRON, PATRICIA L. COOK, and ANTHONY S. PISZEL, Defendants.	)	CIVIL ACTION NO. 1:08-cv-7281 (JFK)

REPLY MEMORANDUM OF LAW IN SUPPORT OF FREDDIE MAC'S MOTION TO DISMISS THE AMENDED COMPLAINT WITH PREJUDICE

TABLE OF CONTENTS

Page

INTRODUCTION 1

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. PLAINTIFF FAILS ADEQUATELY TO PLEAD LOSS CAUSATION 5

A. Plaintiff Must Adequately Allege That The Disclosure Of The Alleged Fraud, Rather Than Marketwide Phenomena, Was The Cause Of Investor Losses 5

B. Plaintiff Fails To Plead That The Disclosure Of The Alleged Fraud, Rather Than Marketwide Phenomena, Was The Cause Of Its Losses 8

1. Plaintiff Fails Sufficiently To Plead That Its Losses Were Caused By Any Alleged Fraud 8

2. Plaintiff Fails Sufficiently To Plead Any Facts That Would Exclude More Likely Explanations For Investor Losses 12

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED UNDER THE PSLRA AND RULE 9(B). 13

A. The Alleged Misrepresentations And Omissions Are Not Pled With The Particularity Required By The PSLRA And Rule 9(b) 14

1. The Amended Complaint Fails Adequately To Plead A Single False Statement Or Omission Of Material Fact 15

2. Plaintiff Fails To Plead A Violation of GAAP 20

a. Plaintiff Fails Adequately To Allege A Violation Of FAS 115 20

b. Plaintiff Fails Adequately To Allege A Violation Of FAS 109 22

B. Plaintiff Fails Adequately To Plead Scienter 23

1. Plaintiff Pleads No Specific Facts Giving Rise To A Strong Inference Of Scienter 24

2. Plaintiff's Confidential Source Allegations Do Not Support Any Inference Of Scienter 24

3. Plaintiff's "Magnitude Of The Fraud" And "Core Business" Allegations Do Not Support A Strong Inference Of Scienter 27

TABLE OF CONTENTS
(CONT'D)

Page

4. The Individual Defendants' Positions Within The Company Cannot Give Rise To A Strong Inference of Scienter 29

5. Plaintiff's Pre-Class Period and Post-Class Period Allegations Do Not Support A Strong Inference Of Scienter...... 31

6. Plaintiff's "Motive And Opportunity" Allegations Do Not Support A Strong Inference Of Scienter........ 31

7. Plaintiff's "Motive And Opportunity Allegations Do Not Support A Strong Inference Of Scienter........ .33

III. THE AMENDED COMPLAINT SHOULD ALSO BE DISMISSED UNDER RULE 12(B)(6) BECAUSE THE PLAINTIFF HAS FAILED TO ALLEGE ANY ACTIONABLE MISREPRESENTATIONS OR OMISSIONS OF MATERIAL FACT........ 36

A. Plaintiff Does Not And Cannot Allege That Any Actual Statement Was "So Incomplete As To Mislead"........ 36

B. Allegations Of Business Mismanagement Do Not State A Claim For Violation Of The Federal Securities Laws........ 38

C. Defendants Disclosed Much Of The Allegedly Omitted Information........ 39

D. Accurate Statements Of Historical Fact Are Not Actionable........ 42

E. Vague And Indefinite Statements Of Optimism Are Immaterial, As A Matter Of Law........ 42

F. The PSLRA's Safe Harbor Provision And The "Bespeaks Caution" Doctrine Immunize Forward-Looking Statements Accompanied By Meaningful Cautionary Language........ 44

CONCLUSION........ 47

TABLE OF AUTHORITIES

Page(s)

CASES

In re 2007 Novastar Fin., Inc., Sec. Litig.,
579 F.3d 878 (8th Cir. 2009) 14

In re 2007 Novastar Fin., Inc., Sec. Litig.,
No. 07-0139, 2008 WL 2354367 (W.D. Mo. June 4, 2008) 17, 39

Acito v. IMCERA Group, Inc.,
47 F.3d 47 (2d Cir. 1995) 22

In re Aegon N.V. Sec. Litig.,
No. 03-0603, 2004 WL 1415973 (S.D.N.Y. June 23, 2004) 30

In re Alcatel Sec. Litig.,
382 F. Supp. 2d 513 (S.D.N.Y. 2005) 14

Backman v. Polaroid Corp.,
910 F.2d 10 (1st Cir. 1990) 36, 37

Barrie v. Intervoice-Brite, Inc.,
397 F.3d 249 (5th Cir. 2005) 21

Bay Harbour Mgmt. LLC v. Carothers,
Nos. 07-1124, 07-1157, 2008 WL 2566557 (2d Cir. June 24, 2008) 16

In re BISYS Sec. Litig.,
397 F. Supp. 2d 430 (S.D.N.Y. 2005) 33

In re Blockbuster Inc. Sec. Litig.,
No. 03-0398, 2004 U.S. Dist. LEXIS 7173 (N.D. Tex. Apr. 26, 2004) 47

In re Bradley Pharms., Inc. Sec. Litig.,
421 F. Supp. 2d 822 (D.N.J. 2006) 7

Caiafa v. Sea Containers Ltd.,
525 F. Supp. 2d 398 (S.D.N.Y. 2007) 22

In re Citigroup S'holder Deriv. Litig.,
964 A.2d 106 (Del. Ch. 2009) 38

In re Citigroup, Inc. Sec. Litig.,
330 F. Supp. 2d 367 (S.D.N.Y. 2004) 17, 18, 39

City of Brockton Ret. Sys. v. Shaw Group, Inc.,
540 F. Supp. 2d 464 (S.D.N.Y. 2008) 28

TABLE OF AUTHORITIES

(CONT'D)

Page(s)

In re Comverse Tech., Inc. Sec. Litig.,
543 F. Supp. 2d 134 (E.D.N.Y. 2008) 41

In re Countrywide Fin. Corp. Sec. Litig.,
588 F. Supp. 2d 1132 (C.D. Cal. 2008) 12, 26, 27, 43

In re Cross Media Mktg. Corp. Sec. Litig.,
314 F. Supp. 2d 256 (S.D.N.Y. 2004)..45

Denny v. Barber,
576 F.2d 465 (2d Cir. 1978)..22

In re Donald J. Trump Casino Sec. Litig.,
7 F.3d 357 (3d Cir. 1993) 45

In re Downey Sec. Litig.,
No. 08-3621, 2009 WL 2767670 (C.D. Cal. Aug. 21, 2009) 7, 8, 35, 37

Druskin v. Answerthink, Inc.,
299 F. Supp. 2d 1307 (S.D. Fla. 2004) 28

Dujardin v. Liberty Media Corp.,
359 F. Supp. 2d 337 (S.D.N.Y. 2005)..19, 41

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005)..5

In re eSpeed, Inc. Sec. Litig.,
457 F. Supp. 2d 266 (S.D.N.Y. 2006)..30

Evers v. General Motors Corp.,
770 F.2d 984 (11th Cir. 1985) 42

Feasby v. Industri-Matematik Int'l Corp.,
No. 99-8761, 2000 WL 977673 (S.D.N.Y. July 17, 2000).......................................34

In re Federal-Mogul Corp. Sec. Litig.,
166 F. Supp. 2d 559 (E.D. Mich. 2001)..28

In re The First Marblehead Corp. Sec. Litig.,
639 F. Supp. 2d 145 (D. Mass. 2009) 8, 17

Fort Worth Employers' Ret. Fund v. Biovail Corp.,
615 F. Supp. 2d 218 (S.D.N.Y. 2005)..45, 46

Page(s)

In re Galileo Corp. S'holders Litig.,
127 F. Supp. 2d 251 (D. Mass. 2001) 21

Ganino v. Citizens Util. Co.,
228 F.3d 154 (2d Cir. 2000).....41

In re Gildan Activewear, Inc. Sec. Litig.,
636 F. Supp. 2d 261 (S.D.N.Y. 2009).....24, 31

Glazer v. Formica Corp.,
964 F.2d 149 (2d Cir. 1992).....36

In re Global Crossing, Ltd. Sec. Litig.,
322 F. Supp. 2d 319 (S.D.N.Y. 2004).....21

In re Goodyear Tire & Rubber Co. Sec. Litig.,
436 F. Supp. 2d 873 (N.D. Ohio 2006).....37

Hall v. Children's Place Retail Stores, Inc.,
580 F. Supp. 2d 212 (S.D.N.Y. 2008).....41, 47

Halperin v. eBanker USA.com, Inc.,
295 F.3d 352 (2d Cir. 2002).....45

Harris v. Ivax Corp.,
182 F.3d 799, 803 (11th Cir. 1999) 46

Hershfang v. Citicorp.,
767 F. Supp. 1251 (S.D.N.Y. 1991).....4, 33

In re IAC/Interactive Corp. Sec. Litig.,
478 F. Supp. 2d 574 (S.D.N.Y. 2007).....45

In re Impac Mortgage Holdings, Inc. Sec. Litig.,
554 F. Supp. 2d 1083 (C.D. Cal. 2008) 39

Joffee v. Lehman Bros. Inc.,
No. 06-0903, 2006 WL 3780547 (2d Cir. Dec. 19, 2006).....41

Konkol v. Diebold, Inc.,
590 F.3d 390 (6th Cir. 2009) 25, 27, 28, 33

Kreysar v. Syron,
No. 09-832 (S.D.N.Y. Jan. 14, 2010) 14

Page(s)

In re K-tel Int'l, Inc. Sec. Litig.,
300 F.3d 881 (8th Cir. 2002) 36

Lapin v. Goldman Sachs Group, Inc.,
506 F. Supp. 2d 221 (S.D.N.Y. 2006)...41, 44

Lentell v. Merrill Lynch & Co.,
396 F.3d 161 (2d Cir. 2005).. passin

Lormand v. US Unwired, Inc.,
565 F.3d 228 (5th Cir. 2009) 7

Makor Issues & Rights, Ltd. v. Tellabs Inc.,
513 F.3d 702 (7th Cir. 2008) 31

Malin v. XL Capital Ltd.,
499 F. Supp. 2d 117 (D. Conn. 2007)...42, 43

Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc.,
576 F.3d 172 (4th Cir. 2009) 34, 35

In re Medtronic Inc. Sec. Litig.,
618 F. Supp. 2d 1016 (D. Minn. 2009)..30, 34

Melder v. Morris,
27 F.3d 1097 (5th Cir. 1994) 4

In re Merrill Lynch & Co. Research Reports Sec. Litig.,
568 F. Supp. 2d 349 (S.D.N.Y. 2008)... passim

Miller v Champion Enters. Inc.,
346 F.3d 660, 672 (6th Cir. 2003) 46

In re Moody's Corp. Secs. Litig.,
599 F. Supp. 2d 493 (S.D.N.Y. 2009)...44

Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
949 F.2d 243 (8th Cir. 1991) 45

Nathanson v. Zonagen, Inc.,
267 F.3d 400 (5th Cir. 2001) 30

In re New Century,
588 F. Supp. 2d 1206 (C.D. Cal. 2008) 26, 35

Page(s)

In re NovaGold Resources Inc. Sec. Litig.,
629 F. Supp. 2d 272 (S.D.N.Y. 2009)....30, 46, 47

In re NTL Inc. Sec. Litig.,
No. 02 2013, 2003 WL 21767948 (S.D.N.Y. July 31, 2003)....14

In re OCA, Inc. Sec. Litig.,
No. 05-2165, 2006 U.S. Dist. LEXIS 90854 (E.D. La. Dec. 14, 2006)....30, 31

In re Omnicom Group, Inc. Sec. Litig.,
No. 02-4483, 2007 WL 2376170 (S.D.N.Y. Aug. 10, 2007)....21

Oran v. Stafford,
226 F.3d 275 (3d Cir. 2000)....36

Panther Partners, Inc. v. Ikanos Commc'ns, Inc.,
538 F. Supp. 2d 662 (S.D.N.Y. 2008)....17

In re PeopleSoft, Inc., Sec. Litig.,
No. 99-00472, 2000 U.S. Dist. LEXIS 10953 (N.D. Cal. May 26, 2000)....30

Pittleman v. Impac Mortgage Holdings, Inc.,
No. 07-0970, 2009 WL 648983 (C.D. Cal. Mar. 9, 2009)....30

In re Polaroid Corp. Sec. Litig.,
465 F. Supp. 2d 232 (S.D.N.Y. 2006)....23

Police & Ret. Sys. Of City of Detroit v. SafeNet, Inc.,
645 F. Supp. 2d 210 (S.D.N.Y. 2009)....31

In re PXRE Group, Ltd., Sec. Litig.,
600 F. Supp. 2d 510 (S.D.N.Y. 2009)....26, 33, 34

In re Radian Sec. Litig.,
612 F. Supp. 2d 594 (E.D. Pa. 2009)....32, 38

Rombach v. Chang,
355 F.2d 164 (2d Cir. 2004)....44, 45

Sable v. Southmark/Envicon Capital Corp.,
819 F. Supp. 324 (S.D.N.Y. 1993)....41

In re Salomon Analyst Level 3 Litig.,
373 F. Supp. 2d 248 (S.D.N.Y. 2005)....28

TABLE OF AUTHORITIES

(CONT'D)

Page(s)

In re Scholastic Corp. Sec. Litig.,
252 F.3d 63 (2d Cir. 2001)....................31, 32

In re Sears, Roebuck & Co. Sec. Litig.,
291 F. Supp. 2d 722 (N.D. Ill. 2003)....................30

Shields v. Citytrust Bancorp, Inc.,
25 F.3d 1124 (2d Cir. 1994)....................44

Stavros v. Exelon Corp.,
266 F. Supp. 2d 833 (N.D. Ill. 2003)....................22

Stumpf v. Garvey,
No. 03-1352, 2005 WL 2127674 (D.N.H. Sept. 2, 2005)....................12

In re Take-Two Interactive Sec. Litig.,
551 F. Supp. 2d 247 (S.D.N.Y. 2008)....................7

Tellabs Inc. v. Makor Issues & Rights,
551 U.S. 308, 324 (2007)....................24

Thor Power Tool Co. v. Comm'r,
439 U.S. 522 (1979)....................21

In re Tommy Hilfiger Sec. Litig.,
No. 04-7678, 2007 U.S. Dist. LEXIS 55088 (S.D.N.Y. July 20, 2007)....................7

Tripp v. IndyMac Fin. Inc.,
No. 07-1635, 2007 WL 4591930 (C.D. Cal. Nov. 29, 2007)....................28, 29, 39

Tuchman v. DSC Communications Corp.,
14 F.3d 1061 (5th Cir. 1994)....................34

Wieland v. Stone Energy Corp.,
No. 05-2088, 2007 U.S. Dist. LEXIS 76636 (W.D. La. Aug. 17, 2007)....................41

In re Williams Sec. Litig.-WCG Subclass,
558 F.3d 1130 (10th Cir. 2009)....................7, 8, 9

Winer Family Trust v. Queen,
503 F.3d 319 (3d Cir. 2007)....................36

In re Winstar Commc'ns,
Nos. 01-3014, 01-11522, 2006 WL 473885 (S.D.N.Y. Feb. 27, 2006)....................7

TABLE OF AUTHORITIES

(CONT'D)

Page(s)

In re Worldcom, Inc. Sec. Litig.,
No. 02-3288, 2005 WL 2319118 (S.D.N.Y. Sept. 21, 2005) 7

INTRODUCTION

Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac") hereby submits this Reply Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Amended Consolidated Complaint ("Amended Complaint" or "AC").

PRELIMINARY STATEMENT

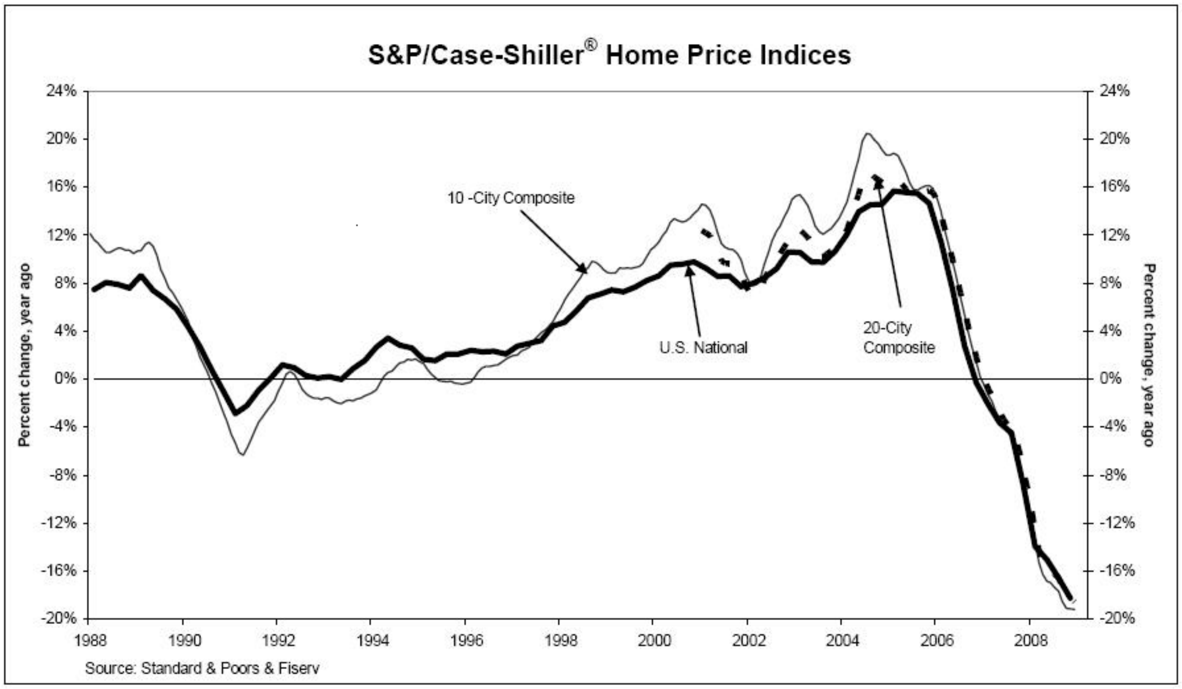
Freddie Mac has moved to dismiss the securities claims in this action on the grounds that Plaintiff has failed to satisfy its pleading obligations under the Private Securities Litigation Reform Act of 1995 ("PSLRA") and Rules 9(b) and 12(b)(6). More specifically, Plaintiff has failed adequately to plead: (1) loss causation; (2) scienter; and (3) that any Defendant made any actionable misrepresentation or omission of material fact. Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss ("Opposition Brief" or "OB") does not and cannot cure the pleading defects that infect Plaintiff's claims.

Plaintiff's Opposition Brief fails to respond to the authority dictating the dismissal of this case. As Freddie Mac has argued, all claims in this case must be dismissed because, as a matter of law, Plaintiff has failed to adequately allege loss causation. MB 14-22. Plaintiff acknowledges that the Supreme Court's ruling in "Dura did not alter or otherwise modify existing Second Circuit standards for pleading loss causation." OB 18. Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005), cert. denied, 546 U.S. 935 (2005), on which Freddie Mac principally relies (MB 14-22), is the controlling Second Circuit case setting forth the applicable standard for pleading loss causation. Plaintiff does not even cite Lentell, let alone make any effort to distinguish that controlling law. Likewise, Plaintiff fails to provide any response whatsoever to this Court's ruling in In re Merrill Lynch & Co. Research Reports Sec. Litig., 568 F. Supp. 2d 349 (S.D.N.Y. 2008) (Keenan, J.). In Merrill Lynch, this Court held that Lentell dictated the dismissal of plaintiffs' federal securities fraud claims for failure adequately to plead loss causation. Id. at 359-60. There is a very good reason that Plaintiff offers no answer to either Lentell or Merrill Lynch: It has none.

As Plaintiff ignores (see OB 18-19), it is Lentell itself that sets forth the controlling law on which Freddie Mac relies:

> "[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases," and a plaintiff's claim fails when "it has not adequately pled facts which, if proven, would show that its loss was caused by the alleged misstatements **as opposed to intervening events**."

Lentell, 396 F.3d at 174 (quoting First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 772 (2d Cir. 1994)) (emphasis added). Plaintiff does not, because it cannot, dispute that: (1) Freddie Mac warned investors that, if housing prices declined, Freddie Mac would suffer losses; and (2) the country thereafter suffered a historically unprecedented drop in housing prices, which triggered unavoidable losses at Freddie Mac and across the entire market. See infra Parts I.B, III.C. Plaintiff's claims fail because "it has not adequately pled facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events," (id.) i.e., the largest percentage decline in U.S. home prices in history, which the graph below illustrates:



S&P/Case-Shiller® Home Price Indices
Percent change, year ago
24%
20%
16%
12%
8%
4%
0%
-4%
-8%
-12%
-16%
-20%
1988
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
10 -City Composite
U.S. National
20-City Composite
Source: Standard & Poors & Fiserv

As the Director of the Federal Housing Finance Agency ("FHFA"), James Lockhart, stated, it was this unprecedented decline in home values that led the U.S. government to place both Freddie Mac and Fannie Mae into conservatorship:

> Unfortunately, as house prices, earnings and capital have continued to deteriorate, [the GSEs'] ability to fulfill their mission has deteriorated. . . . Over the last three years OFHEO, and now FHFA, have worked hard to encourage [the GSEs] to rectify their accounting, systems, controls and risk management issues. [The GSEs] have made good progress in many areas, but market conditions have overwhelmed that progress.

App. 64 at 2; see also id. at 10 ("Unfortunately, the antiquated capital requirements and the turmoil in housing markets over-whelmed all the good and hard work put in by the FHFA teams and [the GSEs'] managers and employees."). The Amended Complaint fails to allege any facts showing that Plaintiff's loss was caused by any alleged misrepresentation, as opposed to the huge drop in home values that triggered the conservatorship. That failure ends this case.

Apart from ignoring controlling law, Plaintiff also pulls statements out of context in order to manufacture a securities fraud case, where no valid case exists. For example, Plaintiff accuses Mr. Syron of misrepresenting "Freddie Mac's exposure to risky non-prime loans" by pulling the following phrases out of context: "[W]e didn't buy any subprime loans. . . we weren't in that business." OB 2. Plaintiff misleadingly uses an ellipsis in order to distort both what Mr. Syron actually said and the context within which he said it. When Mr. Syron's statement is read in full, and in context, it is clear that he was referring to the fact that, although Freddie Mac had purchased within its Retained Portfolio securities backed by subprime loans, Freddie Mac had only purchased a de minimis amount of whole subprime loans in its Guarantee Portfolio, and it thus was essentially not in the business of guaranteeing whole subprime loans. As he stated:

> In terms of our insight into the subprime stuff, we didn't buy any subprime loans, I mean, **we bought some securities, which we can go through, and we think we're fine in. We bought them for goal purposes. But we didn't buy in guarantee, essentially, any subprime loans**. So we weren't in that business."

App. 18 at 12 (emphasis added).

As numerous statements incorporated by reference in the Amended Complaint make clear, Freddie Mac repeatedly disclosed the precise amount of securities backed by subprime loans that it held in its Retained Portfolio. See. e.g., App. 18 at 7 (slide presentation) (detailing composition of Retained Portfolio). Freddie also repeatedly disclosed the composition of its Guarantee Portfolio, where subprime loans constituted only approximately 1% of the portfolio. See, e.g., App. 14 at 8 (slide presentation). Plaintiff cannot base valid securities fraud claims on blatant distortions of Defendants' statements. See, e.g., Melder v. Morris, 27 F.3d 1097, 1100 (5th Cir. 1994) (affirming dismissal of securities fraud class action where "plaintiffs fail[ed] to base their allegations on statements actually made by [defendants], opting instead to selectively distort the company's public statements to create an inference of fraud"). Nonetheless, Plaintiff repeatedly distorts challenged statements by selectively removing them from context. See infra Part II.A. When read in context, it is clear that none of the challenged statements constitutes a misrepresentation of material fact.

Likewise, no amount of rhetoric can compensate for Plaintiff's failure adequately to plead scienter. The Amended Complaint fails to plead any specific fact supporting a strong inference that any Defendant knew that any challenged statement was false when made. See infra Part II.B. Notably, Freddie Mac's CEO, CFO, and COO did not sell a single share of Freddie Mac stock during the class period. To the contrary, they suffered **over $40 million in losses** during that time. As the Second Circuit has held, the absence of stock sales by defendants during the relevant period undermines any inference of scienter. See MB 38 (citing San Leandro Emergency Med. Group, 75 F.3d 801, 814 (2d Cir. 1996)).

Unable to point to hard facts to support its scienter allegations, Plaintiff seeks to compensate for that failure by resorting, instead, to news articles and politically-charged attacks on Freddie Mac. As courts have long recognized: "The complaint must rise or fall on allegations about defendants' conduct and not on wide-eyed citation to the gratuitous commentary of outsiders. Such commentary is irrelevant to plaintiff's claims." See Hershfang v. Citicorp., 767 F. Supp. 1251, 1255 (S.D.N.Y. 1991).

At bottom, Plaintiff's Opposition Brief is little more than a grand misdirection. Controlling Second Circuit law makes clear that Plaintiff has failed adequately to plead loss causation, has failed to plead specific facts supporting a strong inference of scienter, and has alleged no actionable misrepresentations or omissions of material fact. Accordingly, Plaintiff's claims should be dismissed in their entirety, with prejudice.

ARGUMENT

I. PLAINTIFF FAILS ADEQUATELY TO PLEAD LOSS CAUSATION.

Second Circuit law establishes that, to survive a motion to dismiss, securities plaintiffs must plead that the alleged fraud, when disclosed, rather than any market phenomenon, caused their losses. Here, Plaintiff has failed to do so, and its Amended Complaint should be dismissed for this reason alone.

A. Plaintiff Must Adequately Allege That The Disclosure Of The Alleged Fraud, Rather Than Marketwide Phenomena, Was The Cause Of Investor Losses.

Contrary to Plaintiff's assertion otherwise, (OB 17) (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-47 (2005)), the Supreme Court has not resolved the issue of whether loss causation must be pled under Rule 8(a) or Rule 9(b). In fact, in Dura, the Supreme Court declined to reach the issue, finding it unnecessary given that plaintiffs there had failed even to satisfy the more lenient pleading standard of Rule 8(a). See Dura, 544 U.S. at 346-47. Here, too, regardless of whether the Court applies Rule 8(a) or Rule 9(b) to Plaintiff's loss causation allegations, they are legally deficient.

As Plaintiff concedes, the Supreme Court's ruling in "Dura did not alter or otherwise modify existing Second Circuit standards for pleading loss causation." OB 18. Lentell v. Merrill Lynch & Co., 396 F.3d at 171 is the controlling Second Circuit case setting forth the applicable standard for pleading loss causation. The facts and holding in Lentell illustrate the reasons that Plaintiff's loss causation allegations are legally defective here.

In Lentell, plaintiffs alleged that research analysts at Merrill Lynch issued false and misleading reports recommending that investors purchase shares in two Internet companies, even though the analysts did not believe those companies were good investments. 396 F.3d at 164. The district court had granted defendants' motion to dismiss on four independent grounds, including failure to plead loss causation. A panel of the Second Circuit (including now Supreme

Court Justice Sonia Sotomayor) affirmed the dismissal solely on the ground that "the complaints fail to plead that the alleged misrepresentations and omissions caused the claimed losses." Id. It is Lentell itself that sets forth the controlling law on which Freddie Mac relies, which Plaintiff pointlessly encourages this Court to reject. See OB 19.[1] As the Second Circuit stressed:

> "[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases," and a plaintiff's claim fails when "it has not adequately pled facts which, if proven, would show that its loss was caused by the alleged misstatements **as opposed to intervening events**."

Lentell, 396 F.3d at 174 (quoting First Nationwide Bank, 27 F.3d at 772) (emphasis added). Focusing on the specific alleged misstatements -- i.e., "buy" recommendations that the defendants allegedly made fraudulently -- the Second Circuit held that the Lentell plaintiffs failed adequately to plead that those alleged misrepresentations caused plaintiffs' losses, as opposed to the bursting of internet bubble. Id. at 175. In so ruling, the court rejected plaintiffs' contention -- which Plaintiff here makes as well -- that questions of loss causation where there is a marketwide phenomenon can only be resolved at trial. See id. at 174-75.

In Merrill Lynch, this Court applied Lentell in dismissing similar securities claims. There, plaintiff's securities claims were predicated on the allegation that, when Merrill Lynch and others issued "buy" and "accumulate" recommendations for the public company CMGI, they "knew about but concealed the fact that CMGI faced serious cash liquidity problems." 568 F. Supp. 2d at 351.

According to the Merrill Lynch plaintiff, he suffered losses when an allegedly concealed fact -- i.e., CMGI's liquidity problems -- materialized in the form of a liquidity crisis that triggered substantial stock price declines. The Court noted that, in Merrill Lynch, unlike in Lentell, the plaintiff had "attempt[ed] to satisfy the requirements of Lentell by alleging that his

[1] Relying on unreported decisions from Illinois, Plaintiff argues that Freddie Mac's statement of the applicable pleading standard is based on a misreading of Dura. See OB 19. In fact, Freddie Mac relies on the Second Circuit's controlling law in Lentell, as applied by this Court in Merrill Lynch, for the law governing what a plaintiff must plead when its losses coincide with marketwide phenomena causing comparable losses to other investors.

losses resulted when the risk concealed by the Defendants' fraudulent statements and omissions materialized." 568 F. Supp. 2d at 360. The district court, however, held that the plaintiff failed to allege facts showing that the share price decline was due to the materialization of any concealed risk, as opposed to broader market forces. Id. As this Court explained:

> Ventura has failed to allege facts to show that the drop in CMGI's share price was attributable to the risk's materialization, **rather than to the bursting of the Internet bubble or to other factors that are readily apparent from the face of the October 4, 2000 research report.**

Merrill Lynch, 568 F. Supp. 2d at 363 (emphasis added).

Citing Dura, this Court further explained:

> To prove loss causation, plaintiffs must distinguish the alleged fraud from the "tangle of [other] factors" that affect a stock's price. Although plaintiffs "need not quantify the fraud-related loss, they must 'ascribe some rough proportion of the whole loss to [the alleged] misstatements.'"

Merrill Lynch, 568 F. Supp. 2d at 363 (citations omitted).

Plaintiff gets nowhere citing to this Court law from other circuits, while ignoring both Lentell itself and this Court's own recent applications of Lentell and Dura in Merrill Lynch. See OB 21-24.[2] Furthermore, courts in the Second Circuit are not alone in their treatment of loss causation allegations in cases where stock price declines were accompanied by marketwide

[2] None of the loss causation cases on which Plaintiff relies address the market phenomena issue at the core of Lentell and Merrill Lynch, and they are otherwise unhelpful to Plaintiff. See, e.g., Lormand v. US Unwired, Inc., 565 F.3d 228, 261 (5th Cir. 2009) (reversing, in part, grant of motion to dismiss, where series of disclosures culminated in statements that directly contradicted prior statements about same subject); In re Williams Sec. Litig.-WCG Subclass, 558 F.3d 1130, 1140 (10th Cir. 2009) (affirming grant of summary judgment for defendants, holding that corrective disclosure "must at least relate back to the misrepresentation and not to some other negative information about the company" and the revelation of this corrective information must have caused the resulting decline in price); In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 285 (S.D.N.Y. 2008) (granting, in part, motion to dismiss, holding that a corrective disclosure "must somehow reveal to the market some part of the truth regarding the alleged fraud."); In re Tommy Hilfiger Sec. Litig., No. 04-7678, 2007 U.S. Dist. LEXIS 55088, at *3, 8 (S.D.N.Y. July 20, 2007) (denying motion to dismiss, where grand jury subpoenas, non-prosecution agreement involving agreement to amend tax returns, and restatement revealed tax evasion scheme); In re Bradley Pharms., Inc. Sec. Litig., 421 F. Supp. 2d 822, 828 (D.N.J. 2006) (plaintiffs "needed to have alleged in some fashion that 'the truth became known' before 'the share prices fell.'"); In re Winstar Commc'ns, Nos. 01-3014, 01-11522, 2006 WL 473885, at *15 (S.D.N.Y. Feb. 27, 2006) (granting motion to amend, where analyst reports exposed company misrepresentations, triggering drop in stock price); In re Worldcom, Inc. Sec. Litig., No. 02-3288, 2005 WL 2319118, at *35 (S.D.N.Y. Sept. 21, 2005) (granting approval to settlement plan, and not ruling on any loss causation issue).

phenomenon. See In re Downey Sec. Litig., No. 08-3621, 2009 WL 2767670, at *15 (C.D. Cal. Aug. 21, 2009) (plaintiff failed to plead loss causation where a series of alleged disclosures "at best, demonstrate[d] only that the market learned of and reacted to Downey's poor financial health rather than any alleged fraud"); First Marblehead, 639 F. Supp. 2d 145, 164-65 (D. Mass. 2009) (court dismissed claims for failure to plead loss causation where defendant's actual disclosures, the "deterioration in the credit markets" and a "preexisting pattern of stock price declines" negated Lead Plaintiff's theory of loss causation).[3]

In the end, it is Lentell that sets forth the applicable pleading standard, particularly in a setting where, as here, a market-wide phenomenon lowered stock prices across the whole industry. Lentell requires that Plaintiff plead "facts which, if proven, would show that its loss was caused by the alleged misstatements **as opposed to intervening events**." 396 F.3d at 174. As discussed below, the Amended Complaint fails to plead such facts and therefore should be dismissed under Lentell.

B. Plaintiff Fails To Plead That The Disclosure Of The Alleged Fraud, Rather Than Marketwide Phenomena, Was The Cause Of Its Losses.

Rather than point to any false statement that, when disclosed, resulted in any losses, Plaintiff's Opposition Brief asserts a "true financial condition" theory, suggesting that, when Freddie Mac or any other source made any negative public statement about Freddie Mac's business or prospects, it was the revelation of what was "previously hidden by fraud." OB at 22. Plaintiff fails sufficiently to plead that any alleged fraud actually caused any losses or any facts that exclude the more plausible explanation that losses resulted from marketwide forces and the government's imposition of a conservatorship.

[3] Plaintiff's suggestion that those decisions lack weight because they were premised on "prior findings that the defendants did not commit fraud" is inaccurate. OB 21 n.9. In fact, each decision dismissed claims on the independent ground that plaintiffs there failed to plead loss causation. In re Downey Sec. Litig., 2009 WL 2767670, at *15; First Marblehead, 639 F. Supp. 2d at 164-65.

1. Plaintiff Fails Sufficiently To Plead That Its Losses Were Caused By Any Alleged Fraud.

As even cases cited by Plaintiff make clear, there must be a direct relationship between the "truth" that is ultimately disclosed and the alleged misrepresentation. See, e.g., In re Williams Sec. Litig.-WCG Subclass, 558 F.3d 1130, 1140 (10th Cir. 2009) (affirming grant of summary judgment for defendants, holding that corrective disclosure "must at least relate back to the misrepresentation and not to some other negative information about the company" and the revelation of this corrective information must have caused the resulting decline in price) (cited by Plaintiff at OB 22).

As an examination of Plaintiff's contentions demonstrates, none of the "disclosures" that Plaintiff identifies in its Opposition Brief actually correct, or in any way reveal, a prior alleged misrepresentation. First, Plaintiff points to news and analyst reports about Freddie Mac's difficulties raising capital and its anticipated need to raise additional capital going forward. OB 23. While it is true that news reports in July shared the opinion of their authors that Freddie Mac needed to raise capital, Plaintiff fails to point to any earlier statement of hard fact made by any Defendant that was contradicted by any fact in these reports. Indeed, as set forth in the Moving Brief, Freddie Mac provided details about its capital position and warned, if home prices declined and delinquencies increased, it might not be able to meet its mandatory target capital surplus. MB 48-50. As noted above, during the class period, the U.S. economy suffered the largest decline in home values in recorded history, which led to an increase in loan delinquencies, a decline in Freddie Mac's capital base, and, ultimately, the imposition of the conservatorship. See supra Part I.B. Notwithstanding Plaintiff's vague allegations regarding an unspecified overstatement of Freddie Mac's capital, in the year-and-a-half since the government imposed the conservatorship, there has not been any restatement of Freddie Mac's class period financial results, with respect to either its capital level or any other matter.

Second, Plaintiff points to press releases, news reports and other information detailing the government's plan to rescue the GSEs. OB 23. Nothing in those reports reveals that any statement made by any Defendant was false when made. Indeed, these reports acknowledge the declining real estate market, which would necessarily adversely impact the fortunes of Freddie Mac and Fannie Mae.

Third, Plaintiff points to an August 5, 2008 New York Times article. OB 23. Again, that article exposed no fraud. Indeed, that article focused on an alleged memorandum drafted in 2004 concerning whether or not Freddie Mac should make the decision to increase investments in certain sectors of the mortgage markets. As of the beginning of the class period in this case, Freddie Mac already had disclosed not merely the decision that it had made, years earlier, to take on the additional risks associated with increasing its participation in the alternative mortgage markets, but also annually increasing amounts of its participation in those markets. Moreover, as noted in the Moving Brief, in a previously filed lawsuit, Plaintiff's counsel here had asserted that the market learned the alleged truth regarding that issue on the day that the class period in this case **begins**. MB 3-4. In any event, an article discussing an internal debate at Freddie Mac, which took place over three years before the class period began, regarding whether it should increase its participation in the non-traditional mortgage markets, did not reveal that any challenged statement was false, let alone fraudulent.

Fourth, Plaintiff points to a press release, SEC filing and analyst conference call allegedly revealing that Freddie Mac "incurred massive losses due to its investments in non-prime loans." OB 23. The mere fact that Freddie Mac suffered losses as home values declined and delinquencies increased -- which Freddie Mac warned investors would likely occur under such circumstances -- also did not reveal that any challenged statement was false, let alone fraudulent.

Fifth, Plaintiff relies on a Barron's article, dated August 16, 2008, and entitled, "The Endgame Nears for Fannie and Freddie," which discusses the possibility that the government may need to takeover the GSEs due to escalating losses. See OB 23. Plainly, the fact that Freddie Mac experienced increased losses as the real estate market plummeted to historic lows, or that those losses could lead to a government takeover, constituted negative news. Those facts alone, however, did not reveal that any defendant had engaged in fraud.

Plaintiff also alleges that the Barron's article discussed "grossly overstated capital levels" at Freddie Mac. OB 23. The article does not contain that statement, but merely alludes to speculation by unnamed market observers that the assets of both Fannie Mae and Freddie Mac might be worth less than the fair-value figures that both companies reported. See AC ¶ 555. Nothing in that article suggests that any specific disclosure that Plaintiff challenges was false, let alone knowingly false. Furthermore, as noted above, despite the government's takeover of Freddie Mac in September 2008 and Freddie Mac's filing of audited financial results thereafter, there has been no restatement of Freddie Mac's reported asset levels or any other line item of any financial statement that Freddie Mac issued during the class period. Thus, the Barron's article plainly did not reveal that any challenged statement was false, let alone fraudulent.

Sixth, Plaintiff cites a September 7, 2008 New York Times article, which reported the imposition of the conservatorship. By pointing to such a disclosure, Plaintiff makes plain that its theory of causation is merely a "true financial condition" theory. Nothing in that article revealed any prior statement to be false. Rather, the imposition of the conservatorship was completely consistent with greater market forces, which caused both GSEs to incur substantial losses, and which caused the failure or government bailout of some of the largest financial institutions in the country. Indeed, as the Director of FHFA Lockhart stated:

> Over the last three years OFHEO, and now FHFA, have worked hard to encourage [the GSEs] to rectify their accounting, systems, controls and risk management issues. They have made good progress in many areas, but **market conditions have overwhelmed that progress**.

App. 64 at 2 (emphasis added).

In sum, none of the disclosures identified by Plaintiff revealed any alleged fraud. While many disclosures during the proposed class period contained negative facts and speculation regarding Freddie Mac and its prospects, none of those disclosures revealed that any of the statements that Plaintiff challenges were knowingly false when made. The government stated its reasons for placing both Freddie Mac and Fannie Mae into conservatorship on the same day, for the same reasons, and it was because those entities were continuing to suffer losses amidst severe and declining "market conditions," and not because they each, separately but simultaneously, engaged in any fraud. See App. 64 at 2; see also id. at 10.

2. Plaintiff Fails Sufficiently To Plead Any Facts That Would Exclude More Likely Explanations For Investor Losses.

Not only has Plaintiff failed to allege that the disclosure of any fraud caused its losses, but it also has failed to exclude more likely explanations for its losses, such as the collapse of the real estate market and the concomitant credit crisis. Indeed, Plaintiff has failed to "show that its loss was caused by the alleged misstatements **as opposed to intervening events**." Lentell, 396 F.3d at 174 (quoting First Nationwide Bank, 27 F.3d at 772) (emphasis added), and failed to "distinguish the alleged fraud from the tangle of other factors that affect a stock's price" or "ascribe some rough proportion of the whole loss to the alleged misstatements." Merrill Lynch, 568 F. Supp. 2d at 363 (internal brackets, quotations and citations omitted). Accordingly, Plaintiff's Amended Complaint should be dismissed.

In its Opposition Brief, Plaintiff repeatedly asserts that Freddie Mac was a cause of the real estate market collapse, and claims to have detailed factual support for that assertion in the Amended Complaint. See OB 19-21. Contrary to Plaintiff's assertion, there is no such support in the Amended Complaint. Thus, Plaintiff's reliance on Stumpf v. Garvey, No. 03-1352, 2005 WL 2127674 (D.N.H. Sept. 2, 2005) is misplaced. In that case, plaintiffs successfully pled that the misrepresentations at issue regarding a particular product actually caused a collapse in the market for that product. Here, Plaintiff does not, and cannot, make any such allegation.

Similarly, Plaintiff's reliance on Countrywide is misplaced. Countrywide stands for the fundamental proposition that it is possible to plead that a company engaged in fraud during a broader market downturn. In such a case, where plaintiffs have pleaded both misrepresentations and disclosures of misrepresentations, which led to losses, parsing out the loss attributable to fraud and the loss attributable to market forces may take place at a later stage of the case. That, however, does not help Plaintiff here, who has failed to plead either misrepresentations that led to stock price inflation or revelations of a fraud that caused investor losses.

Plaintiff's failure to establish the requisite casual connection between the alleged "corrective disclosures" and a fall in stock price is highlighted by the fact that, during the class period, Freddie Mac's stock price had fallen by 40% prior to the first purported corrective disclosure on July 3, 2008. MB 18, 21. See Merrill Lynch, 568 F. Supp. 2d at 364 (dismissing complaint for failure to plead loss causation where complaint failed "to explain how the decline of the stock price . . . was attributable to the alleged fraud, rather than simply a continuation of the loss in value that afflicted CMGI during the Internet sector's collapse"). The implausibility of Plaintiff's contentions is further highlighted by the fact that the stock price of Fannie Mae and Freddie Mac moved in tandem during the nationwide housing crisis. Plaintiff's facile assertion in its Opposition Brief that Fannie Mae has also been accused of securities fraud, and that issues of stock price movement are factual issues on which experts may opine (OB 27 n.14) is no substitute for allegations that render plausible Plaintiff's unsupported contention that some sort of fraud caused investor losses during the proposed class period.

In sum, Plaintiff simply ignores the worst housing crisis in U.S. history, and conclusorily attributes the decline in Freddie Mac's stock price to alleged fraud. Because Plaintiff has failed to allege "(i) facts sufficient to support an inference that it was defendant's [alleged] fraud -- rather than other salient factors -- that proximately caused plaintiff's loss; or (ii) facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment," its complaint should be dismissed. See Merrill Lynch, 568 F. Supp. 2d at 363 (citing Lentell, 396 F.3d at 174).

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED UNDER THE PSLRA AND RULE 9(b).

Plaintiff's Opposition Brief impermissibly attempts to cure the Amended Complaint's pleading defects by simply substituting Plaintiff's own unsupported factual conclusions for the particularized facts that it was required to plead under the PSLRA and Rule 9(b). Plaintiff's shell game cannot imbue its factually deficient complaint with the factual particularity required by the PSLRA and Rule 9(b).

A. The Alleged Misrepresentations And Omissions Are Not Pled With The Particularity Required By The PSLRA And Rule 9(b).

As Freddie Mac demonstrates in its Moving Brief, among the Amended Complaint's most glaring deficiencies is its abject failure to plead fraud with particularity. MB 23-25. In particular, the Amended Complaint "does not provide any link between an alleged misleading statement and specific factual allegations demonstrating the reasons why the statement was false or misleading, as the PSLRA requires." In re 2007 Novastar Fin. Inc., Sec. Litig., 579 F.3d 878, 883 (8th Cir. 2009); see also MB 24-25. Plaintiff responds in its Opposition Brief by noting that the Amended Complaint contains "identifiable sections with clear, concise headings and subheadings" with a "table of contents" "up front." OB 14. Plaintiff misses the point. Its complaint is a tangle of citations to statements juxtaposed with unrelated and unsupported conclusory assertions. For this reason alone, the Amended Complaint is subject to dismissal.

Plaintiff's "concise headings" and "table of contents" notwithstanding, the Amended Complaint fails to satisfy the strict pleading standards of the PSLRA because it "plac[es] the burden on the Court to sort out the alleged misrepresentations and then match them with the corresponding adverse facts" allegedly showing that they were knowingly false when made. See In re Alcatel Sec. Litig., 382 F. Supp. 2d 513, 534 (S.D.N.Y. 2005); see also Kreysar v. Syron, No. 09-832 (S.D.N.Y. Jan. 14, 2010) (oral opinion referenced in endorsed order) (dismissing similar securities claims against some of the Individual Defendants in this case where plaintiffs' 269-page complaint failed to present a genuine actionable grievance in a short, concise statement as required by Rule 8). Nor does the fact that Plaintiff highlights numerous statements with bold and italics excuse it from the obligation to plead specific facts explaining why each challenged statement was knowingly false when made. See In re NTL Inc. Sec. Litig., No. 02-3013, 2003 WL 21767948, at *1 (S.D.N.Y. July 31, 2003) (granting motion to dismiss complaint because "the Court is left to guess whether every statement . . . is said to have been false and misleading and, if so, what supposedly was wrong with each"). Try as it might, Plaintiff simply cannot cure the Amended Complaint's pleading deficiencies through the rhetoric in its Opposition Brief.

1. The Amended Complaint Fails Adequately To Plead A Single False Statement Or Omission Of Material Fact.

In its Opposition Brief, Plaintiff argues that the Amended Complaint's fraud allegations can be "distilled" into three "examples". OB 2-3. The purported "examples" encapsulate Plaintiff's defective method of pleading securities fraud. Each example begins with snippets of much longer statements that Plaintiff selectively removes from their larger context. See OB 2-3. Having effectively distorted the statements through selective quotation, Plaintiff presents what it describes, ironically, as "[r]eality," which merely constitutes Plaintiff's own conclusory allegations from the Amended Complaint. Contrary to Plaintiff's assertion, each of Plaintiff's purported "examples" of fraud is a work of fiction.

Plaintiff labels the first example of its "distilled" allegations as "[m]isrepresentations regarding Freddie's exposure to risky non-prime mortgage loans." OB 2. In support of its description, Plaintiff quotes the following partial statement from a 12-page conference call transcript: "We didn't do any subprime business." OB 2; see App. 18. Plaintiff has plucked this statement from its historical and textual context and, in the process, distorts its meaning.

The cited sentence was uttered by Mr. Syron on December 11, 2007, three weeks after the Company released its earnings for the third quarter of 2007. See App. 13. On the day that Freddie Mac released its earnings for the third quarter of 2007, it disclosed that it held $105 billion of securities backed by subprime loans in its Retained Portfolio, 97.6% of which were rated AAA, and that whole subprime loans constituted only 1% of its Guarantee Portfolio. See App. 14 at 9 & 22 (slide presentation). Further, a slide show presented during the earnings conference that followed the release of Freddie Mac's results revealed that only a bare fraction of that 1% was purchased during that year, with the majority of that 1% having been purchased in prior years. App. 14 at 9 (slide presentation).

Plaintiff also distorts the referenced statement by removing it from its textual context, within which it is clear that Defendant Syron was referring to the composition of Freddie Mac's guarantee portfolio:

> Finally, we feel that our credit position **in the current guarantee book**, actually, is very near the best of the entire industry. A very major reason for this is that we have very low exposures to alt A in risk-layered mortgage products **in the guarantee business**. We didn't do any subprime business. And if you look at layered products and alt A, they together amount to about 9% **of our total guarantee portfolio**.

App. 18 at 4 (emphasis added). No one could possibly have been misled by Mr. Syron's statement, particularly here, where the composition of the Guarantee and Retained Portfolios were specifically and concretely disclosed. Unable to plead specific facts challenging the Company's disclosures specifying the exact composition of its portfolio, Plaintiff resorts to pulling statements out of context. Such a distortion cannot support a claim for securities fraud. See Bay Harbour Mgmt. LLC v. Carothers, Nos. 07-1124, 07-1157, 2008 WL 2566557, at *2 (2d Cir. June 24, 2008) (rejecting plaintiff's characterization of challenged statement after reviewing the challenged statement in context, and affirming dismissal of all claims).

Having, through selective omission, blatantly distorted Defendant Syron's actual statements, Plaintiff has the audacity to present what it terms "[r]eality," but is actually a series of unsupported, conclusory allegations from its Amended Complaint. Freddie Mac's Moving Brief addresses each of Plaintiff's unsupported conclusions. See MB 31 n.31 (addressing Plaintiff's pre-Class Period allegations regarding Freddie Mac's former risk officer); MB 7-8 & 46-48 (discussing Freddie Mac's extensive disclosures regarding its subprime investments); and MB 25 (addressing Plaintiff's concocted "$628.5 billion" figure).

Plaintiff's second example purportedly relates to "[m]isrepresentations regarding Freddie's capital adequacy." OB 3. Plaintiff cites as allegedly misleading the statement from the Company's July 11, 2008 press release that "Freddie Mac is not on the threshold of conservatorship because we are adequately capitalized." Id.; see App. 33. Again, Plaintiff omits the surrounding context of the quoted statement to obscure its meaning. The full context of the challenged statement is as follows:

> **We believe current speculation** in the media around the issue of conservatorship does not accurately reflect the facts. Freddie Mac is not on the threshold of conservatorship because we are adequately capitalized. The **preliminary**

> **indications** of our expected financial performance for **the** **second** **quarter**, while reflecting the challenges that face the industry, do not point to an **immediate** **need** to raise additional capital.

App. 33 (emphasis added).

As is evident from the portions of the July 11, 2008 press release that Plaintiff omits, the single sentence that Plaintiff challenges is not actionable for several reasons. To begin, it is an optimistic statement of belief concerning the prospect that Freddie Mac would be placed into conservatorship. Optimistic statements that are not ultimately borne out by events are not actionable under the federal securities laws. See Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 538 F. Supp. 2d 662, 669 (S.D.N.Y. 2008) (dismissing claims "craftily drafted to imply that what only became clear due to subsequent events was somehow known to [defendant] far earlier in time"). In addition, Plaintiff has not pled the existence of a single specific fact, or a single communication, document, or conversation, indicating that Defendants believed on July 11, 2008 that Freddie Mac was inadequately capitalized or on the threshold of conservatorship.

Further, Plaintiff has failed to plead any specific facts challenging the accuracy of Freddie Mac's capital base disclosures. See MB 13. Freddie Mac's capital base disclosures during the class period were: (1) reaffirmed by the Office of Federal Housing Enterprise Oversight ("OFHEO"); (2) scrutinized by FHFA; (3) reviewed by Congress; and (4) certified by its outside auditor. See MB 12-14. Not one of those entities has requested that Freddie Mac restate any of its prior capital base disclosures during the class period. See In re 2007 Novastar Fin., Inc., Sec. Litig., No. 07-0139, 2008 WL 2354367, at *3 (W.D. Mo. June 4, 2008) (finding it "noteworthy that nobody-the SEC, Novastar's auditors, or anyone else-has suggested Novastar should or must restate its financial reports"), aff'd, 579 F.3d 878 (8th Cir. 2009). Moreover, to the extent that Plaintiff argues that Freddie Mac should have raised additional capital earlier to stave off conservatorship, it is alleging that the Company engaged in mismanagement, which cannot serve as the basis of a claim under the federal securities laws. See, e.g., First Marblehead, 639 F. Supp. 2d at 160-61 ("Lead Plaintiffs' internal controls and mismanagement allegations fail to state a cognizable claim because . . . mismanagement is not actionable in securities law.");

In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367, 375-77 (S.D.N.Y. 2004) (dismissing allegations that defendants failed to adhere to risk management policies as corporate mismanagement claims, not actionable as securities fraud).

Plaintiff's final example of the Amended Complaint's fraud allegations concerns "[m]isrepresentations regarding Freddie's underwriting, due diligence, and quality control." OB 3. Plaintiff's example: "During the past year we have taken important steps to address the impact of the declining housing and credit market to our business. . . . We have begun raising prices, tightened our credit standards and enhanced our risk management practices." OB 3. As an initial matter, Plaintiff's third example, much like examples one and two, relies upon a statement plucked from context, in this case a four-page press release announcing Freddie Mac's financial results for Q3 2007. See App. 12. Plaintiff's myopic focus on this statement ignores the disclosures in the press release that emphasized the prevailing market conditions and their negative effect on Freddie Mac:

> "Freddie Mac is a housing finance company operating in what **today is a troubled housing and credit market**. It will take time for this market to turn around. But as it improves, we are optimistic about Freddie Mac's **longer-term prospects**. . . . **Weakening house prices and deteriorating credit have hurt Freddie Mac's results**, as well as those of other participants in the mortgage market," said Buddy Piszel, [CFO]. "You can see the impact of these trends in our credit results and throughout our financial statements. Year-to-date, we have recognized $4.6 billion in net credit-related items on a pre-tax basis."

App. 12 at 1 (emphasis added). Instead of acknowledging, much less addressing, Freddie Mac's warnings, Plaintiff alleges, without factual support, that "Defendants ignored dire warnings" and loosened underwriting standards to purchase "non-prime and non-traditional loans." OB 3.

Plaintiff's allegation lacks any temporal or factual specificity, and ignores Freddie Mac's numerous disclosures regarding its increased participation in the non-traditional mortgage market during 2006 and 2007. Plaintiff fails to allege how Defendant Piszel's statement that Freddie Mac had taken steps during 2007 to "address the impact of the declining housing and credit markets" on its business was false or misleading. Instead, Plaintiff cites to a large swath of the Amended Complaint that focuses primarily on a **2004** pre-class period memorandum that in no way contradicts Defendant Piszel's statement that Freddie Mac "tightened [its] credit standards and enhanced [its] risk management practices" during **2007**. Compare OB 3 (citing AC ¶¶ 81-125), with App. 12. In addition, Plaintiff ignores the fact that Freddie Mac repeatedly disclosed that it was increasing its investment in non-traditional mortgage products during 2006 and 2007 (MB 45-48), along with the hard facts regarding those investments (MB 46-48). Indeed, in its 2005 and 2006 annual reports, Freddie Mac specifically warned investors that it was significantly changing its mortgage sourcing and purchasing strategies, along with changing its underwriting guidelines, to purchase loans that increased its exposure to credit losses:

> **We are making significant adjustments to our mortgage sourcing and purchase strategies in an effort to meet our housing goals and subgoals, including changes to our underwriting guidelines** . . . . For example, we are purchasing loans and mortgage-related securities that offer lower expected returns on our investment and **increase our exposure to credit losses**. . . . If our current efforts to meet the goals and subgoals prove to be insufficient, we may need to take additional steps that could lead to **a further reduction of service to portions of the conventional conforming mortgage market**, and also **a reduction in our profitability**.

App. 2 at 13 (emphasis added); see also Freddie Mac, 2005 Annual Report, at 13 (June 28, 2006), available at http://www.freddiemac.com/investors/ar/pdf/2005annualrpt.pdf. Consequently, Plaintiff's conclusory allegation that Freddie Mac misrepresented changes to its underwriting standards and loan purchases cannot support a claim. See Dujardin v. Liberty Media Corp., 359 F. Supp. 2d 337, 348 (S.D.N.Y. 2005) (dismissing securities claims where public filings disclosed what plaintiffs alleged was concealed).

At bottom, Plaintiff's allegations of fraud are built upon a house of cards comprised of a litany of conclusions untethered to any actual, particularized facts pled in the Amended Complaint. Plaintiff's pleading strategy, on full display in the Opposition Brief, is simply to state with certitude that fraud has occurred and then cite its own ipse dixit in ostensible support. Indeed, a comparison of Plaintiff's sweeping, unsupported proclamations of fraud in the Opposition Brief to the alleged "facts" in the Amended Complaint that Plaintiff contends support its conclusions demonstrates Plaintiff's pleading deficiencies. Whether the Plaintiff refers to internal reports (not a single specific fact regarding any Defendant allegedly received) (MB 30-31), underwriting standards (no single fact pled showing a single communication to any Defendant that any particular underwriting standard was being violated) (MB 32-35), internal controls (no facts showing that any alleged deficiency in internal controls was specifically communicated to any Defendant) (id.), exposure to nontraditional loans (disclosed in Freddie Mac's information statements) (MB 45-48), or capital adequacy (disclosed quarterly, never restated, affirmed by OFHEO, never challenged by FHFA, and certified by Freddie Mac's outside auditor) (MB 12-14), the Court invariably will find a conclusory allegation unsupported by a single specific fact indicating that any Defendant knowingly made any false or misleading statement of material fact. See, e.g., OB 2-4 & 28-31.

2. Plaintiff Fails To Plead A Violation Of GAAP.

In its Opposition Brief, Plaintiff offers nothing more than a half-hearted defense of its GAAP allegations. See OB 32-34. As discussed below, Plaintiff: (1) offers no good answer to the arguments in Freddie Mac's Moving Brief, which are dispositive of Plaintiff's GAAP-related claims; and (2) fails to distinguish a single case cited in the Moving Brief in support of Freddie Mac's argument that Plaintiff's GAAP-related claims are defectively pled. Compare OB 32-34 with MB 26-30.

a. Plaintiff Fails Adequately To Allege A Violation Of FAS 115.

In its Opposition Brief, as in the Amended Complaint, Plaintiff conclusorily asserts, without the benefit of any specific facts, that Freddie Mac violated FAS 115 by failing timely to record "an other-than-temporary impairment in the value of Freddie Mac's investments that it classified as AFS securities in its financial statements." AC ¶ 359. Plaintiff, however, ignores the relevant law on this point, which is uniform and clear: To base a claim for securities fraud on an alleged violation of GAAP, a plaintiff must plead specific facts demonstrating that the defendant violated the GAAP provision on which a plaintiff relies. MB 26-27 (citing Greebel v. FTP Software, Inc., 194 F.3d 185, 203-04 (1st Cir. 1999); In re K-Tel Int'l, Inc. Sec. Litig., 300

F.3d 881, 891-93 (8th Cir. 2002); and In re Capstead Mortgage Corp. Sec. Litig., 258 F. Supp. 2d 533, 550 (N.D. Tex. 2003)).[4]

Plaintiff also ignores the fact that the determination of when the value of an asset should be written down is a highly subjective determination that courts are loath to second guess. See, e.g., In re Galileo Corp. S'holders Litig., 127 F. Supp. 2d 251, 265-66 (D. Mass. 2001); see also Thor Power Tool Co. v. Comm'r, 439 U.S. 522, 544 (1979) (noting that GAAP "tolerate[s] a range of 'reasonable' treatments, leaving the choice among alternatives to management"). Plaintiff simply does not plead specific facts demonstrating that Freddie Mac's subjective judgment in applying FAS 115 to its AFS securities strayed beyond the "range of reasonable treatments." See In re Omnicom Group, Inc. Sec. Litig., No. 02-4483, 2007 WL 2376170, at *14 (S.D.N.Y. Aug. 10, 2007) (Report & Recommendation) (defendants failed to demonstrate defendants' fraudulent intent because "reasonable minds could differ" as to asset valuation). Plaintiff's failure to address these points is fatal to its GAAP allegations.[5]

Indeed, instead of responding to the specific arguments in Freddie Mac's Moving Brief, Plaintiff brief recites its conclusory FAS 115 allegations. That is, Plaintiff argues that Freddie Mac should have written down the value of its AFS securities earlier, during the class period. See OB 33. In support of its conclusory assertion, Plaintiff cites to Freddie Mac's post-class

[4] Plaintiff's reliance on In re Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319, 339 (S.D.N.Y. 2004) and Barrie v. Intervoice-Brite, Inc., 397 F.3d 249, 257 (5th Cir. 2005) for the proposition that "whether Defendants actually violated GAAP is a factual question not appropriate for resolution at the motion to dismiss stage" is ill-founded. See OB 32. Under the PSLRA and Rule 9(b), Plaintiff is required to plead the alleged fraud with particularity, including specific facts to support its explanation as to why the challenged statement is false. See supra Part II.A. Unlike here, the Global Crossing and Barrie plaintiffs pled particularized facts sufficient to establish potential violations of the GAAP provisions at issue. See Global Crossing, 322 F. Supp. 2d at 338-41; Barrie, 397 F.3d at 257-58.

[5] Plaintiff also ignores its own allegation that Freddie Mac's subprime investment was essentially limited to AAA securities with multiple credit enhancements that increased their ability to absorb losses. Compare AC ¶ 352, with MB 27-28 and App. 82 ¶ 26 (FASB Staff Position No. FAS 115-2) ("[a]n entity also should consider how other credit enhancements affect the expected performance of the security"). Instead of explaining how Freddie Mac violated FAS 115 in relying on those credit enhancements when applying FAS 115, Plaintiff simply denies their existence. See OB 33 n.17. However, plaintiff has no support for that assertion -- the Amended Complaint's allegations to which Plaintiff cites do not discuss the specific credit enhancements on the Company's subprime securities, but whether Freddie Mac had "insurance" on its Alt-A securities. See AC ¶ 244.

period decision to recognize an $8.9 billion impairment loss on its AFS securities.[6] Plaintiff's argument amounts to nothing more than an allegation of fraud by hindsight that cannot support a claim under the federal securities laws. See, e.g., Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978). There is no specific fact pled in the Amended Complaint -- not one document or statement attributed to a confidential witness -- that supports a strong inference that any Defendant knew during the class period that Freddie Mac's AFS securities were other-than-temporarily impaired yet failed to write down the value of those securities.

The mere fact that Freddie Mac eventually wrote down the value of certain of its AFS securities after the class period -- and after the worst percentage declines in home values in U.S. history -- does not mean that its failure to do so during the class period amounted to securities fraud. See Acito v. IMCERA Group, Inc., 47 F.3d 47, 53 (2d Cir. 1995) ("Mere allegations that statements in one report should have been made in earlier reports do not make out a claim of securities fraud."); Caiafa v. Sea Containers Ltd., 525 F. Supp. 2d 398, 410 (S.D.N.Y. 2007) (granting motion to dismiss where $500 million write-down did not evidence that earlier financial disclosures were fraudulent); Stavros v. Exelon Corp., 266 F. Supp. 2d 833, 851-52 (N.D. Ill. 2003) (allegation that asset write down should have occurred in first or second quarter, rather than in third quarter, provided no basis from which to infer scienter). Supported only by garden variety fraud-by-hindsight allegations, Plaintiff's FAS 115 allegations are defective.

b. Plaintiff Fails Adequately To Allege A Violation Of FAS 109.

Much like Plaintiff's arguments in support its FAS 115 claim, Plaintiff's FAS 109 arguments utterly ignore the relevant accounting standard. As Freddie Mac explains in its Moving Brief, FAS 109 requires an enterprise to consider "[a]ll available evidence, both positive and negative" in determining whether a sufficient amount of future taxable income will exist to realize the enterprise's deferred tax assets. App. 80 ¶ 20. FAS 109 defines positive evidence to

[6] Both Plaintiff's Amended Complaint and its Opposition Brief assert that Freddie Mac announced $22.5 billion in other-than-temporary impairments on its AFS securities after the end of the class period. AC ¶ 426; OB 33. In support of its allegation, Plaintiff quotes to an undated disclosure stating that Freddie Mac recognized an impairment loss of $8.9 billion during the third quarter of 2008. See AC ¶ 426. Nowhere does Plaintiff explain how it reached its $22.5 billion figure.

include "**[a] strong earnings history** exclusive of the loss that created the future deductible amount . . . coupled with evidence indicating that the loss (for example, an **unusual**, **infrequent**, or **extraordinary** item) is an **aberration** rather than a continuing condition." Id. ¶ 24 (emphasis added). Ultimately, "[a]n enterprise must use judgment in considering the relative impact of negative and positive evidence." Id. ¶ 25.

Plaintiff's Opposition Brief, like its Amended Complaint, utterly ignores this test. Nowhere does Plaintiff even attempt to explain: (1) why Freddie Mac's strong earnings history (average income of $4.1 billion from 2000 through 2006), which FAS 109 directs entities to consider, did not constitute positive evidence militating against forming a valuation allowance; or (2) why the "once in a century credit tsunami" that struck the housing market during the class period did not qualify as an "unusual, infrequent, or extraordinary item" under FAS 109. See MB 28-30. Instead of addressing these dispositive points, Plaintiff simply concludes that Freddie Mac should have written down its deferred tax assets "[d]ue to the extreme unlikelihood that Freddie would realize the benefits" of those assets. OB 34. Of course, Plaintiff offers no specific facts as to why, in light of both positive and negative evidence, Freddie Mac's subjective determination not to write down the value of its deferred tax assets earlier than March 31, 2008 amounted to fraud. See In re Polaroid Corp. Sec. Litig., 465 F. Supp. 2d 232, 243 (S.D.N.Y. 2006) (dismissing claim for failure to allege facts showing that company's expectation that it would earn sufficient income to support its deferred tax assets was fraudulent). Ultimately like its FAS 115 allegations, Plaintiff's FAS 109 allegations, bereft of specifics and ignorant of the applicable accounting standard, rest squarely on fraud-by-hindsight allegations.

In sum, Plaintiff's failure to plead any allegedly actionable statements with the particularity required by the PSLRA and Rule 9(b) dictates the dismissal of its claims.

B. Plaintiff Fails Adequately To Plead Scienter.

Ignoring the governing law, Plaintiff's Opposition Brief relies on conclusory, "must have known" allegations, non-sequiturs, and any attenuated argument Plaintiff can muster in lieu of pleading specific facts giving rise to a strong inference of scienter. Plaintiff's efforts fail to give rise to any inference of scienter, let alone the requisite strong inference.

Significantly, Plaintiff is not entitled to all inferences of scienter. Rather, scienter allegations will only survive a motion to dismiss if those inferences are reasonable, strong, and at least as compelling as any opposing inference that one could draw from the facts alleged. They are not. Tellabs Inc. v. Makor Issues & Rights, 551 U.S. 308, 324 (2007). In fact, Plaintiff fails to demonstrate how the Amended Complaint's conclusory allegations are "equally strong" as the many inferences undermining or negating any inference that Defendants acted with scienter, including the absence of any stock sales, the enormous investment losses suffered by the Individual Defendants, Plaintiff's reliance on confidential sources who admittedly had no contact with any Individual Defendants, and the overall market decline that punished the stock price of virtually all public companies.

As set forth below, none of Plaintiff's efforts to plead scienter, taken individually or collectively, supports a strong inference of scienter.

1. Plaintiff Pleads No Specific Facts Giving Rise To A Strong Inference Of Scienter.

In its Opposition Brief, Plaintiff conclusorily states that "the Complaint details a staggering disconnect between Defendants' Class Period public statements and Freddie's internal operations." OB 57. Plaintiff fails to specify how there was any alleged "disconnect," nor does Plaintiff point to any facts about Freddie Mac's internal operations, let alone what any Individual Defendant knew about such internal operations, that contradicted any public statement. See OB 57-58. As this Court has stated, "[w]here Plaintiff contends defendants had access to contrary facts, they must specifically identify the reports or statements containing this information to indicate how it was inconsistent with the statements made." In re Gildan Activewear, Inc. Sec. Litig., 636 F. Supp. 2d 261, 272 (S.D.N.Y. 2009) (emphasis added). Plaintiff fails to include any such specific allegations in its Amended Complaint.

2. Plaintiff's Conclusory Allegations Regarding What Defendants Allegedly Knew Do Not Give Rise To A Strong Inference Of Scienter.

In its Opposition Brief, Plaintiff reiterates its "must have known" allegations from the

Amended Complaint. See, e.g., OB 51-52 (conclusorily stating that certain events demonstrated the Individual Defendants' awareness of certain alleged capital adequacy issues). Courts in the Second Circuit give no credence to conclusory "must have known" allegations, which by their nature are unsupported by specific facts actually known by defendants. See MB 31.

For example, Plaintiff fails to establish how any information in any alleged meeting or any alleged "risk report" was inconsistent with any challenged statement. MB 31; see OB 49 & n.25. Recently, the Sixth Circuit affirmed the dismissal of allegations that were similarly bereft of particularized facts. Konkol v. Diebold, Inc., 590 F.3d 390, 397-99 (6th Cir. 2009). The Diebold court's rejection of similar internal report allegations is instructive:

> The investors' complaint alleges access to information, but it lacks **sufficiently detailed facts regarding the financial reports, how they were used, and their connection to the Defendants**. There are no allegations, for example, as to **whether the reports were used to produce [the challenged statements], whether they were ever compared to other reports that accurately reflected revenue, or whether the Defendants were the ones who created the reports**."

590 F.3d at 397 (emphasis added). Further, the court concluded that allegations regarding defendants' attendance at weekly and monthly meetings "without more, does not support a finding of scienter given that the complaint does not **allege that the [fraud] was discussed in the meetings**." Id. at 398-99 (emphasis added). In reaffirming the PSLRA's strict requirements for pleading scienter, the Diebold court noted that "what is relevant is the role of these reports in perpetuating the alleged [fraud] and the role of these reports in the Defendants' decision-making process." Id. at 398.

Here, Plaintiff similarly fails to link any single meeting or report to any fraud or any Defendant's decision-making process. Plaintiff admits that **not one** of the Individual Defendants attended the meetings its alleged confidential witnesses attended. AC ¶ 223; see also OB 57 n.29. Plaintiff does not assert that any Defendant received any alleged "risk report," let alone explain how any such report contradicted any challenged statement. At most, a confidential witness is cited to support a "must have known" allegation, asserting that because one or more of the Individual Defendants possibly had to "sign off" on the report, therefore the Defendants were aware of "the impending risks and related implications to the Company." AC ¶ 223. Such generalized access allegations cannot support a strong inference of scienter, as a matter of law. See In re PXRE Group, Ltd., Sec. Litig., 600 F. Supp. 2d 510, 538 (S.D.N.Y. 2009) (granting motion to dismiss noting that "[p]laintiff points to no case in which a court in this District has inferred a 'top executive's' 'access' to contrary facts based on the expression of 'concerns' from one employee to another"), aff'd, 2009 WL 4893719 (2d Cir. Dec. 21, 2009).

The allegations in this case bear virtually no relation to the allegations in In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132 (C.D. Cal. 2008), on which Plaintiff relies.[7] Indeed, Countrywide highlights what is missing from the Amended Complaint here. In Countrywide, the complaint contains detailed allegations showing that during the class period, the defendants made public statements that were directly contradicted by their own internal statements. See id. at 1146 & 1192-93. Those internal statements were not conclusorily alleged; instead there were specific, concrete examples of what the individual defendants allegedly said, which were at odds with public statements. See id. at 1146 (Countrywide officers "expressly said they would not lower underwriting standards in service of the market share goal," while later admitting that company underwriting standards changed so much that billions in loans originated in 2005 and 2006 "could not have been made" under earlier guidelines). Plaintiffs in Countrywide also cited many examples of specific internal documents that contradicted public statements made by Countrywide's management. See id. at 1192-93. For example:

- Countrywide's CEO "chastised his competition for 'pushing further down the credit chain into the 500 FICOs, and below 550'" despite internal documents, quoted in the complaint, "touting loan approvals where borrowers had FICOs in the low 500s." Id. at 1192.
- Countrywide's CEO proclaimed, "'I don't think there's any amount of money you can charge upfront to cover your losses on' loans with '500 FICOs and below 550, 540, 530'" which "directly contradict[ed]" "internal documents that systematically encouraged approving virtually any loan with additional 'add-on' fees." Id. at 1192-93.

[7] The allegations in In re New Century, 588 F. Supp. 2d 1206 (C.D. Cal. 2008) also bear no relation to the allegations here. In New Century, the defendants: (1) restated prior financial results; (2) admitted previously undisclosed internal control weaknesses; (3) sold $53 million in company stock during the class period; and (4) received bonuses that were 300% higher due to the falsely inflated earnings results. Id. at 1214, 1215-16, 1232.

- The complaint quoted an internal email from a senior vice president explaining that Countrywide had "lowered its underwriting guidelines to 'incorporate a wider range of credit scores'" in order to "allow more loans to be approved without requiring an exception approval," which directly contradicted management's public statement that Countrywide would not lower its underwriting standards to achieve increased market share. Id. at 1148 & n.13; see also id. at 1192.

In sharp contrast, here, while the vast majority of Freddie Mac's holdings during the putative class period were prime loans and related securities, Freddie Mac repeatedly disclosed that it was **increasing** its participation in the subprime and non-traditional mortgage markets -- which necessarily involved purchasing loans and mortgage-backed securities that had been extended to less credit worthy borrowers. MB 45-48; supra Part II.A. Unlike the complaint in Countrywide, the Amended Complaint does not describe any one contemporaneous internal document that directly contradicted any challenged statement.

Moreover, in Countrywide, the individual defendants sold a staggering **$735 million** in Countrywide stock during the proposed class period (including **over $400** million in sales by Countrywide's CEO).[8] In contrast, here, as discussed below, Plaintiff does not allege that the Individual Defendants sold **any** stock during the class period. In sum, Plaintiff's conclusory allegations amount to no more than "must have known" allegations, which cannot support any inference of scienter, as a matter of law.

3. Plaintiff's Alleged "Confidential Sources" Do Not Support Any Inference Of Scienter.

In its Opposition Brief, Plaintiff concedes that its confidential witnesses had no contact with the Individual Defendants. OB 57 n.29 (noting that "these witnesses may not have directly interacted with the Individual Defendants"). As noted in Freddie Mac's Moving Brief, courts have declared such lack of contact with defendants grounds for discounting confidential source allegations and granting motions to dismiss. See MB 32-33 & n.34; see also Diebold, 590 F.3d at 401 (confidential source allegations properly discounted where plaintiff did not "connect the Defendants to the [fraud]" and the majority of the confidential witnesses "are not identified as

[8] Consolidated Am. Compl. at 161, In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132 (C.D. Cal. 2008) (No. 07-05295), available at http://pacer.uspci.uscourts.gov; see also Countrywide, 588 F. Supp. 2d at 1145.

having *any* contact or interaction with any of the Defendants."); City of Brockton Ret. Sys. v. Shaw Group, Inc., 540 F. Supp. 2d 464, 474 (S.D.N.Y. 2008) (rejecting confidential witness allegations that did not establish that defendant was aware of adverse facts).

Ignoring this law, Plaintiff argues that its confidential sources should not be discounted because they "describe, based on personal knowledge, operations at Freddie Mac that were at odds with Defendants' public statements" and "red flags" that Defendants allegedly disregarded. OB 57 n.29. However, as one court has aptly noted:

> If during World War II, General George C. Marshall had reported that the Allied Offensive was going well, but a private at the front reported that the war looked pretty bad to him, there would not be a strong inference from the private's comments that General Marshall was lying about the overall success of the military strategy.

In re Federal-Mogul Corp. Sec. Litig., 166 F. Supp. 2d 559, 564 (E.D. Mich. 2001). Plaintiff simply cannot establish a strong inference of scienter by relying on statements of former employees that merely reflect "that [the] employees and Defendants had different business judgments." Druskin v. Answerthink, Inc., 299 F. Supp. 2d 1307, 1334 (S.D. Fla. 2004); see also In re Salomon Analyst Level 3 Litig., 373 F. Supp. 2d 248, 252 (S.D.N.Y. 2005) ("[T]he fact that other individuals within SSB may have had views . . . does not provide any basis for an inference that [an individual defendant] did not believe his own professed opinions on [the company's] value, or that the other valuation models . . . constituted SSB's true institutional opinion (if such a concept is even meaningful).").

The court in Tripp v. IndyMac Fin. Inc., No. 07-1635, 2007 WL 4591930 (C.D. Cal. Nov. 29, 2007) rejected similarly defective confidential witness allegations. There, confidential witnesses also made allegations regarding alleged problems with the defendant company's business that were not disclosed. Holding those allegations defective, the court explained:

> In the [complaint], Plaintiffs have cited the beliefs and opinions of certain confidential witnesses with respect to the allegedly problematic areas of IndyMac's operations. However, **Plaintiffs have failed to allege that the individual Defendants shared these beliefs and opinions or even that they were aware of them and found them to be reliable and justified.**

Id., at *3 (emphasis added). Those same allegations are lacking here. Having failed to identify any confidential source who supports an allegation bearing on the state of mind of any Defendant, Plaintiff's confidential source allegations cannot support any inference of scienter.

4. Plaintiff's "Magnitude of the Fraud" And "Core Business" Allegations Do Not Support A Strong Inference of Scienter.

Unable to point to any direct evidence, Plaintiff is forced to resort to the argument that it can plead scienter based on circumstantial evidence, i.e., the notion that the Defendants "must have known" the allegations attributed to its confidential witnesses based upon the "magnitude of the alleged fraud" or its supposed relationship to Freddie Mac's "core operations." OB 50-52 & 56. Each of Plaintiff's arguments is specious.

Plaintiff's alleged "magnitude of the fraud" does not provide any circumstantial evidence of scienter here. Where plaintiff fails properly to allege any specific accounting error or financial restatement by defendants, courts will not infer scienter from the purported "magnitude" of the alleged fraud.[9] Plaintiff does not, and cannot, assert that Freddie Mac restated any of its financial results, or its core capital base disclosures, at any point during the class period, or thereafter. Nor has any outside entity, including Congress, OFHEO, FHFA, or the Company's outside auditor, requested that Freddie Mac do so. See supra Part II.A (citing In re 2007 Novastar, 2008 WL 2354367, at *3). In light of these pleading deficiencies, the magnitude of Plaintiff's alleged fraud provides no evidence, circumstantial or otherwise, that any Defendant acted with a strong inference of scienter.[10]

Plaintiff's "core business" argument likewise provides no support for its scienter allegations. "[T]he Second Circuit has not endorsed this theory" of "imput[ing] an inference of

[9] Plaintiff offers no support for its argument that this Court should find a strong inference of scienter with regard to a corporate defendant where it cannot allege scienter with regard to any individual defendants "in situations where, like here, a company's internal practices are so far out of line with the company's public statements." OB 56-57. The cases Plaintiff cites do not stand for that proposition, and Plaintiff neither sufficiently alleges scienter as to any Defendant nor establishes that alleged internal practices were "out of line" with any challenged statement.

[10] Unable to point to an actual restatement or accounting violation, Plaintiff asserts that Freddie Mac receives "vast sums of bailout money" as evidence of the magnitude of the fraud. OB 56. Plaintiff points to no authority that receipt of government funds indicates fraud -- let alone fraud of a sufficient magnitude for a court to infer scienter.

scienter to each defendant by virtue of the fact that the alleged fraud concerned 'core' business operations." In re NovaGold Resources Inc. Sec. Litig., 629 F. Supp. 2d 272, 304 (S.D.N.Y. 2009); see also In re eSpeed, Inc. Sec. Litig., 457 F. Supp. 2d 266, 294 n.209 (S.D.N.Y. 2006) (noting that "post-PSLRA decisions in other Circuits have cast doubt on whether scienter can be pleaded in this manner").

Even if the Second Circuit did recognize a "core operations" inference -- and it does not -- Plaintiff fails to plead specific facts demonstrating that the alleged fraud involved Freddie Mac's "core operations." See In re Medtronic Inc., Sec. Litig., 618 F. Supp. 2d 1016, 1034 (D. Minn. 2009) (dismissing claims where plaintiff failed to plead facts supporting a core operations theory); In re Aegon N.V. Sec. Litig., No. 03-0603, 2004 WL 1415973, at *18 (S.D.N.Y. June 23, 2004) (same). For example, in Pittleman v. Impac Mortgage Holdings, Inc., No. 07-0970, 2009 WL 648983 (C.D. Cal. Mar. 9, 2009), the court recently rejected a similar "core operations inference" argument where the defendant was like Freddie Mac, a monoline company that invested in real estate assets. The complaint attributed to confidential sources allegations that the company was purchasing mortgage loans that violated its underwriting guidelines, which allegedly caused significant losses. See Impac, 2009 WL 648983, at *3. In dismissing the plaintiff's claims, the court observed that "[t]he core operations inference permits an inference of scienter in 'exceedingly rare' cases where an event is so prominent that it would be 'absurd' to suggest that key officers lacked knowledge of it." Id. It held that Impac was not such a case, nor is this one. See id.

Each of the cases that Plaintiff cites in support of its argument involves particularized allegations concerning a specific "flagship product" or the defendant's sole or core line of business.[11] In contrast, here, subprime and nontraditional mortgages are not Freddie Mac's

[11] See In re Sears, Roebuck & Co. Sec. Litig., 291 F. Supp. 2d 722, 727 (N.D. Ill. 2003) (information was "clearly critical to [the company's] 'core operations.'"); In re PeopleSoft, Inc., Sec. Litig., No. 99-00472, 2000 U.S. Dist. LEXIS 10953, at *12 (N.D. Cal. May 26, 2000) (massive defects in company's "flagship products"); Nathanson v. Zonagen, Inc., 267 F.3d 400, 422 (5th Cir. 2001) (company, which had only one product, noted in filings that "[s]ubstantially all of the Company's efforts and expenditures over the next few years will be devoted to [the product]" and "the Company's future prospects are substantially dependent on" the product); In re OCA, Inc. Sec. Litig., No. 05-2165, 2006 U.S. Dist. LEXIS 90854, at *60-64 (E.D. La. Dec. 14, 2006) ("the company's single

"flagship" products, nor do they constitute its core business. In fact, the vast majority of loans in Freddie Mac's Guarantee and Retained Portfolios are traditional, prime mortgages. See MB 7; App. 14 at 8, 22. Even if it were permissible to infer that a defendant "must have known" that statements were false due to their relation to a company's "core operations" -- and it is not -- Plaintiff has failed to allege facts to support any such inference here.

5. The Individual Defendants' Positions Within The Company Cannot Give Rise To A Strong Inference of Scienter.

In its Opposition Brief, Plaintiff repeats rote allegations that the Individual Defendants "must have known" of the alleged fraud by virtue of their positions within the company or alleged access to unspecified information. OB 52-54. It is black letter law that such allegations are insufficient. Police & Retirement Sys. of City of Detroit v. SafeNet, Inc., 645 F. Supp. 2d 210, 234 (S.D.N.Y. 2009) (rejecting allegation that an inference of scienter may be drawn from a director or officer's position at the company or alleged access to internal documents); In re Gildan Activewear, Inc., 636 F. Supp. 2d at 273-74 (same). Plaintiff fails to identify a single case that holds otherwise. OB 52-54.

As alleged evidence of the Individual Defendants' purported access to information, Plaintiff lists a series of statements by Defendant Piszel which allegedly demonstrate that the Individual Defendants should have been aware of certain information about the Company. OB 53. The identified statements do not contain a single specific fact indicating that Defendant Piszel, or anyone else, knew or was reckless in not knowing that any challenged statement was false when made, and the mere fact that a defendant utters a statement that a plaintiff alleges is false cannot be enough to give rise to an inference that the defendant knew it was false.

6. Plaintiff's Pre-Class Period and Post-Class Period Allegations Do Not Support A Strong Inference Of Scienter.

Plaintiff asserts that In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 72 (2d Cir. 2001) provides that Plaintiff may use information outside of the class period to establish a strong

---

largest asset" overstated); Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 709 (7th Cir. 2008) (alleged fraud involved the defendant company's "most important products," including its "flagship product").

inference scienter. OB 48.[12] Here, however, Plaintiff does not point to any pre- or post-class period information that indicates that any Defendant acted with scienter.

With respect to pre-class period allegations, Plaintiff argues that the Individual Defendants ignored: (1) an alleged 2004 report from then employee Andrukonis suggesting that the Company refrain from purchasing certain loans; (2) an alleged August 2007 report from then-employee Davies identifying risks affecting the Company; and (3) advice given in 2004 by then-employee Solberg to maintain a thick capital cushion. OB 48-49 & n.24. None of these allegations support a strong inference that any Defendant acted with scienter with respect to any of the challenged statements made during the class period. Plaintiff does not, because it cannot, explain how those pre-class period statements rendered any statement false, let alone knowingly false, when made.[13] Indeed, Plaintiff does not even allege that Mr. Davies' alleged "risk report" was provided to any of the Individual Defendants. Furthermore, Freddie Mac plainly did disclose, before the class period began, not only that it had increased its participation in the non-traditional mortgage market, and that it expected to incur greater risks and losses in connection with such investments, but also that it actually had suffered such losses. As discussed elsewhere, Plaintiff is merely alleging supposed mismanagement, which is not actionable under federal securities law. See MB 42-44.

Plaintiff's litany of post-class period allegations fare no better. While Plaintiff points to resignations, congressional testimony, news reports, government investigations, government bailout funds and a filing disclosing subprime loan amounts, none of these allegations supports any inference that any particular Defendant knew that any specific challenged statement was false when made. OB 54-55. To begin, courts in this district and numerous others have held that

[12] Scholastic is also distinguishable on its facts. There, (1) an individual defendant sold approximately 80% of his stock during the class period; (2) the individual defendant never had sold a single share prior to his class period sales; and (3) plaintiffs alleged with sufficient particularity that defendants' statements about a certain product were made while defendants possessed adverse information contradicting their statements. Id. at 74, 77.

[13] See, e.g., In re Radian Sec. Litig., 612 F. Supp. 2d 594, 618 (E.D. Pa. 2009) ("[T]he Plaintiff here are attempting to show that the defendants recklessly ignored trends in the subprime industry . . . and that therefore they possessed the requisite scienter. However, nothing in the [complaint] establishes that [the company's] failure to report an impairment of its investment in [a company that invested in subprime mortgages] was an egregious departure from the range of reasonable business decisions, even in light of the deteriorating subprime market.").

an officer's resignation alone is not indicative of scienter. See, e.g., In re PXRE Group, Ltd., 600 F. Supp. 2d at 545; In re BISYS Sec. Litig., 397 F. Supp. 2d 430, 446 (S.D.N.Y. 2005).

Plaintiff's reliance on post-class period congressional testimony and news reports also fails to support any inference of scienter. These statements are not indicative of fraud, as the speakers and writers possessed no foundation for comments regarding what any Defendant knew at any particular time about any specific statement. Hershfang, 767 F. Supp. at 1255 ("The complaint must rise or fall on allegations about defendant[s'] conduct and not on wide-eyed citation to the gratuitous commentary of outsiders. Such commentary is irrelevant to plaintiff's claims."); see also id. at 1255-56 ("analysts' opinions are neither relevant to this complaint nor admissible, and, even if the analysts' assumptions are true, that can not reasonably lead to an inference that defendants made intentional or reckless misrepresentations to the public at an earlier time") (internal quotation marks omitted).

Plaintiff also gets nowhere by arguing scienter should be inferred from "highly publicized investigations initiated by the SEC, the FBI and other governmental agencies." OB 55. Plaintiff has no response to the cases cited by Freddie Mac, in which numerous courts have held the pendency of government investigations insufficient to support any inference of scienter. See MB 35-37 (collecting cases); see also Diebold, 590 F.3d at 402 (rejecting allegation of government investigations as supportive of scienter inference).[14]

7. Plaintiff's "Motive And Opportunity" Allegations Do Not Support A Strong Inference Of Scienter.

Plaintiff also seeks to generate an inference of scienter by arguing that Defendants were motivated to commit fraud because Freddie Mac was competing for market share with its sister GSE, Fannie Mae, and to prevent undercapitalization and possible subsequent harm to the Company and its reputation. As discussed below, such a generalized motive (i.e., to gain market share and prevent harm to the company), shared by virtually all public companies and their

[14] The lone Florida district court case cited by Plaintiff is outweighed by overwhelming authority establishing that investigations are not probative of scienter. See OB 55 (citing Eastwood Enters. LLC v. Farha, No. 07-1940, 2009 U.S. Dist. LEXIS 88945, at *13-14 (M.D. Fla. Sept. 29, 2009)).

officers, cannot raise any inference of scienter. Moreover, and crucially, Plaintiff does not, because it cannot, deny that the Individual Defendants sold no stock at all during the class period and, consequently, suffered losses to the value of their investment holdings totaling over **$40 million**. MB 37-39. Substantial precedent, and common sense, establish that such losses are inconsistent with any motive to commit fraud, and therefore undermine any inference of scienter.

In its Opposition Brief, Plaintiff attempts to infer scienter from the alleged fact that Freddie Mac was competing for market share with Fannie Mae. OB 46-47 & 47 n.22. Such a generalized motive allegation cannot support any inference of scienter, as a matter of law. See, e.g., Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1068-69 (5th Cir. 1994) (affirming dismissal of securities claims, holding that allegations that defendants were motivated to, inter alia, increase market share, fail to "set out facts sufficient to lead to a proper inference of scienter."); In re Medtronic Inc., 618 F. Supp. 2d at 1036-37 (dismissing securities claims, holding that alleged desire to maintain 50% market share was insufficient to establish a strong inference of scienter).

Nor can scienter be inferred from Plaintiff's allegations that the Defendants were motivated to prevent undercapitalization and possible subsequent government interference and harm to the Company's reputation. See OB 46. As the court in PXRE Group recently declared:

> The alleged motivation of a corporation to raise money to prevent the negative ramifications of a resultant drop of a credit rating or stock price -- even if such a drop would allegedly threaten the 'survival' of a company -- is far too generalized (and generalizable) to allege the proper 'concrete and personal' benefit required by the Second Circuit [to infer scienter].

600 F. Supp. 2d at 531-32; see also Feasby v. Industri-Matematik Int'l Corp., No. 99-8761, 2000 WL 977673, at *4 n.5 (S.D.N.Y. July 17, 2000) ("[A]llegations that defendants were motivated by a desire to raise capital or benefited by raising capital are insufficient.") (quotations omitted).[15]

[15] Plaintiff improperly relies on a concurring opinion in a Fourth Circuit case for its argument that motive to raise capital is sufficient. See OB 47 (citing Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc., 576 F.3d 172, 199 (4th Cir. 2009)). The Matrix court majority opinion instead declared that the alleged facts did not support a strong inference of scienter. Plaintiff's reliance on New Century, 588 F. Supp. 2d 1206, 1229 (C.D. Cal. 2008) also

Moreover, Plaintiff does not, because it cannot, deny that the Individual Defendants sold no stock at all during the class period and, consequently, suffered losses to the value of their investment holdings totaling over **$40 million**. MB 37-39. While Plaintiff argues that the absence of any stock sales does not negate any inference of scienter, it fails to distinguish the numerous cases Freddie Mac cites in its Moving Brief, including controlling authority from the Second Circuit, in which courts have found that the absence of stock sales or investment losses suffered by defendants during the relevant period undermines any inference of scienter. See MB 38-39 (citing San Leandro Emergency Med. Group, 75 F.3d 801, 814 (2d Cir. 1996)). Particularly here, where there are no specific facts supporting any inference of scienter, the absence of stock sales by the Individual Defendants exposes Plaintiff's argument as insufficient to raise a strong inference of scienter. Contrary to Plaintiff's argument, post-Tellabs courts **have** continued to negate inferences of scienter where the defendant sold no stock during the relevant period. See, e.g., In re Downey, 2009 WL 2767670, at *13 ("[A] strong inference of scienter is negated when there is an absence of stock sales or where such sales are minimal.").[16]

Rather than address these many authorities, Plaintiff cites a single case in which a court found an inference of scienter despite no alleged suspicious stock sales. OB 47 n.23 (citing Siracusano v. Matrixx Initiatives, Inc., No. 06-15677, 2009 U.S. App. LEXIS 23716, at *39-40 (9th Cir. Oct. 29, 2009)). In sharp contrast to the present case, in that case the plaintiff made particularized allegations regarding internal reports of adverse effects of, and lawsuits concerning, a product, which were inconsistent with defendant's statements about that product's potential for growth and profitability. Plaintiff makes no such particularized allegations here, and thus the Individual Defendants' substantial losses undermine any inference of scienter.

---

is misplaced because the court there did not declare a motive to raise capital and/or prevent bankruptcy and its negative effects to be sufficient to support a strong inference of scienter.

[16] Plaintiff offers no factual support for its argument that the Individual Defendants were "richly rewarded" by their alleged misstatements. See OB 47 n.22. As discussed in Freddie Mac's Moving Brief, Plaintiff has failed to plead specific facts regarding how any such compensation policy related to any of the challenged statements, as would be required for any inference of scienter. MB 39. Indeed, as Plaintiff acknowledges, the Individual Defendants did not receive any bonus or stock option grants at the end of 2008. See OB 47 n.22.

III. THE AMENDED COMPLAINT SHOULD ALSO BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE PLAINTIFF HAS FAILED TO ALLEGE ANY ACTIONABLE MISREPRESENTATIONS OR OMISSIONS OF MATERIAL FACT.

As discussed in Freddie Mac's Moving Brief, Plaintiff has failed to state a claim based on any alleged misrepresentation or omission of material fact. First, Plaintiff does not and cannot allege that any actual statement made by Defendants was "so incomplete as to mislead." MB 41-42. Second, Plaintiff's claims are founded upon allegations of business mismanagement that cannot support a claim for violation of the federal securities laws. MB 42-45. Third, Defendants disclosed much of the allegedly omitted information. MB 45-48. As discussed further below, each of these deficiencies represents an independent ground for dismissal of Plaintiff's claims.

A. Plaintiff Does Not And Cannot Allege That Any Actual Statement Was "So Incomplete As To Mislead."

In its Opposition Brief, Plaintiff concedes that there is no positive law that required Defendants to disclose the myriad alleged omissions. MB 46-48; OB 35. Thus, Plaintiff is left to argue that Defendants statements were not "truthful and complete," but rather were misleadingly incomplete. OB 35-36. Plaintiff's suggestion that Defendants' disclosures were "so incomplete as to mislead" is without merit.

As Freddie Mac highlighted in its Moving Brief, a statement that is allegedly "so incomplete as to mislead" is only actionable under very narrow circumstances. See Backman v. Polaroid Corp., 910 F.2d 10, 16 (1st Cir. 1990); MB 41-42.[17] Crucially, Plaintiff concedes that Polaroid "is consistent with Second Circuit law." OB 36 n.19. Under Polaroid and its progeny, Plaintiff must do more than simply claim that Freddie Mac failed to disclose "shoddy underwriting practices." OB 36 n.19.

Plaintiff concedes that Polaroid "is consistent with Second Circuit law" (OB 36 n.19), yet Plaintiff fails to meet the requirements set forth in that case. While Plaintiff has quoted en masse allegedly false statements, it nowhere indicates which of the alleged statements identified in the

[17] See also Glazer v. Formica Corp., 964 F.2d 149, 156 (2d Cir. 1992) (applying Polaroid in affirming dismissal of securities fraud claims); Winer Family Trust v. Queen, 503 F.3d 319, 330 (3d Cir. 2007) (same); In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d at 897-99 (same); Oran v. Stafford, 226 F.3d 275, 285-87 (3d Cir. 2000) (same).

Amended Complaint were "so incomplete as to mislead" or why. Courts decline to engage in the sort of matching game necessitated by Plaintiff's lengthy and confusing Amended Complaint, and this Court should decline to do so here. See, e.g., Downey, 2009 WL 2767670, at *3 (dismissing, with prejudice, 504-paragraph complaint that "placed the burden on the reader to sort out the statements and match them with the corresponding adverse facts to solve the 'puzzle' of interpreting Plaintiff's claims") (quotations omitted); In re Goodyear Tire & Rubber Co. Sec. Litig., 436 F. Supp. 2d 873, 904 (N.D. Ohio 2006) (dismissing with prejudice a complaint that "requir[ed] the Court to try to match the allegedly fraudulent statements to the allegations of wrongdoing that are scattered throughout the seventy-plus page Amended Complaint").

Apparently, Plaintiff's best effort to explain how Freddie Mac's statements were so incomplete as to mislead is the assertion that Defendants failed to disclose that Freddie Mac had loosened its underwriting standards thereby allowing the Company to "materially increase the scope of its non-prime and non-traditional loan purchases." OB 36. As an initial matter, Freddie Mac **did** disclose that it was changing its underwriting standards to increase its purchases of non-traditional loans. MB 46-48; see supra Part II.A ("[w]e are making **significant adjustments to our mortgage sourcing and purchase strategies** in an effort to meet our housing goals and subgoals, including **changes to our underwriting guidelines**") (emphasis added). For years before the class period began, Freddie Mac made numerous disclosures regarding its decision materially to increase the scope of non-prime and non-traditional loan purchases, the risks associated with doing so, and the amount of such increases in its Guaranteed and Retained Portfolios. See supra Part II.A, B; MB 46. In any event, Plaintiff fails to identify how any single challenged statement was misleadingly incomplete due to Freddie Mac's supposed failure to disclose this information.

Just as in Polaroid, Plaintiff's conclusory allegations fail to indicate how any of the alleged statements were "so incomplete as to mislead." While Plaintiff has quoted en masse allegedly false statements, it fails to allege any well-pled facts that were omitted from such statements that rendered them misleading. Accordingly, Plaintiff has not alleged any omission of material fact that is actionable under Section 10(b).

B. Allegations Of Business Mismanagement Do Not State A Claim For Violation Of The Federal Securities Laws.

As Freddie Mac previously observed, Plaintiff's allegations amount to no more than assertions of corporate mismanagement, which are not actionable under federal securities laws. MB 42-45. Unable to refute that point, Plaintiff attempts to recast its many mismanagement allegations, contending that "it does not take issue with" Freddie Mac's management decisions, but only Freddie Mac's alleged failure to disclose Freddie Mac's subprime and non-traditional mortgage loan purchases. See OB 36. In so arguing, Plaintiff asks this Court to close its eyes to the obvious: Freddie Mac's business decisions regarding its investment in subprime and non-traditional loans were disclosed to the market, along with the risks associated with those business decisions. MB 45-48.

Plaintiff misses the point when it asserts that the Delaware Chancery Court's decision in In re Citigroup S'holder Deriv. Litig. "does not help Defendants" because it did "not involve public misrepresentations regarding the scope of the risk undertaken." OB 37 n.20. Here, Plaintiff ignores specific disclosures that alerted investors to the risks undertaken, which were, in any event, well-known to the market. MB 46-48; In re Radian Sec. Litig., 612 F. Supp. 2d 594, 618 (E.D. Pa. 2009) (dismissing securities claims for failure to allege scienter, noting that "declining conditions in the subprime market" were among "facts that were known by the plaintiffs and by the market at large"). The risks were disclosed. For this reason, Citigroup is directly relevant. As the Delaware Chancery Court recognized, the mere fact that a company knowingly takes on risk and thereafter suffers enormous losses as a consequence of those known risks does not even state a claim for breach of fiduciary duty, let alone fraud. 964 A.2d 106, 130 (Del. Ch. 2009).

Tellingly, Plaintiff makes no attempt to distinguish its mismanagement allegations from the mismanagement allegations in NovaStar, Impac, Tripp, and Citigroup. OB 36-37. Those cases, like this one, involved allegations regarding investment in subprime and Alt-A loans and securities, loosening underwriting guidelines, and deviations from risk management policies. See In re 2007 NovaStar Fin., Inc. Sec. Litig., 2008 WL 2354367, at *13; In re Impac Mortgage Holdings, Inc. Sec. Litig., 554 F. Supp. 2d 1083, 1087 (C.D. Cal. 2008); IndyMac Fin. Inc., 2007 WL 4591930, at *3-4; In re Citigroup, Inc., 330 F. Supp. 2d at 375-76. Although the plaintiffs in each of those cases, like Plaintiff here, sought to characterize their action as one attacking allegedly misleading disclosures, the courts in all of those cases held that plaintiffs were essentially accusing the defendants of engaging in mismanagement, which is not actionable under Section 10(b). The same is true here.

C. Defendants Disclosed Much Of The Allegedly Omitted Information.

As Freddie Mac outlined in its Moving Brief, an examination of Plaintiff's alleged omissions, see, e.g., AC ¶¶ 3, 441-49, 452-54, 457-63, 465, along with Freddie Mac's relevant disclosures, reveals that Freddie Mac broadly disclosed to investors much of the allegedly omitted information.[18] In an effort to circumvent those disclosures, Plaintiff engages in sleight of-hand by responding to arguments that Freddie Mac did not advance in its Moving Brief, i.e., the "truth-on-the-market" defense. See, e.g., OB 37. Plaintiff's attempt at legerdemain only underscores the weakness of its claims. Unable to craft any legitimate response to the fact that the Company disclosed precisely what Plaintiff alleges it concealed, Plaintiff recasts Freddie Mac's arguments to allow Plaintiff the opportunity to fashion a plausible response. Of course, Plaintiff's riposte to an imaginary argument gets it nowhere.

Freddie Mac's argument is simple and straightforward: Freddie Mac in fact **did** disclose the information that Plaintiff alleges was omitted or concealed. MB 45-52. After all, in the Amended Complaint, Plaintiff alleges, inter alia, that Freddie Mac concealed its exposure to subprime and non-traditional loans. See, e.g., AC ¶¶ 3, 452-54, 457-63, 465. However, try as it might, Plaintiff cannot escape the fact that Plaintiff and other investors were on notice of many

[18] Defendants do not argue that Freddie Mac disclosed all of the allegedly omitted information only because some of the allegedly omitted "facts" are not facts at all, but rather just conclusory assertions, unsupported by the particularized pleading necessary to survive a motion to dismiss. See supra Part I.C.

of the very **facts** and **risks** that the Amended Complaint incorrectly alleges were omitted:

- Freddie Mac broadly disclosed its investment in subprime and nontraditional mortgages. See, e.g., App. 2 at 24, 68 & 69 (2006 Annual Report); App. 6 at 21, 75 & 76 (Supp. to the 2006 Information Statement & Annual Report); App. 7 at 14, 56 (Table 22) & 94 (2007 Annual Report); App. 14 at 9 (Nov. 20, 2007 Conference Call Tr.).

- Freddie Mac broadly disclosed the risks associated with its investment in subprime and nontraditional mortgages. See, e.g., App. 2 at 68 (2006 Annual Report); App. 7 at 3 & 14 (2007 Annual Report).

- Freddie Mac disclosed the amount of its capital base, its minimum capital requirements, and the risk that its capital base may decline below required levels. See, e.g., App. 6 at 26 (Supp. to the 2006 Information Statement & Annual Report); App. 3 at 2, 11 (Supp. to Information Statement dated Mar. 23, 2007 (June 14, 2007)); App. 4 at 2, 11 (Supp. to Information Statement dated Mar. 23, 2007 (Aug. 30, 2007)); App. 5 at 2, 12 (Supp. to Information Statement dated Mar. 23, 2007 (Nov. 20, 2007)); App. 15 (Nov. 27, 2007 Press Release); App. 7 at 32 (2007 Annual Report); App. 8 at 5, 24-25 (Supp. to Information Statement dated Feb. 28, 2008 (Feb. 28, 2008)); App. 10 at 8, 108 (Form 10-Q for Period Ended June 30, 2008).

- Freddie Mac made many disclosures regarding its due diligence and underwriting standards. See, e.g., App. 7 at 20, 90-91 (2007 Annual Report).

- Freddie Mac issued numerous disclosures regarding material weaknesses in its internal controls. See, e.g., App. 7 at 109 (2007 Annual Report).

MB 45-51.

Choosing to ignore the fact that Freddie Mac plainly disclosed information that Plaintiff alleges was omitted, Plaintiff devotes three pages to rebutting a defense that the Company did not advance -- the "truth-on-the-market" defense. Plaintiff, however, fails to appreciate the difference between the "truth-on-the-market" defense and the fact that Freddie Mac plainly disclosed what Plaintiff alleges was omitted. As Plaintiff concedes, defendants in securities cases often use the "truth-on-the-market" defense to rebut the presumption that a misrepresentation affected the market price of a stock by showing that the truth of the matter was already known to the market **through sources other than defendants**. See Ganino v. Citizens Util. Co., 228 F.3d 154, 167 (2d Cir. 2000); OB 37-38.

Here, however, Freddie Mac does not argue that some other source provided information to the market that cured a prior alleged misrepresentation before Plaintiff's purchase of stock.[19] Rather, Freddie Mac is relying on a different doctrine entirely; i.e., the well-settled rule that a defendant cannot be held liable for omitting information that it plainly and repeatedly **disclosed itself** to the market. MB 45-48; see, e.g., Joffee v. Lehman Bros. Inc., No. 06-0903, 2006 WL 3780547, at *1 (2d Cir. Dec. 19, 2006) (affirming dismissal where "all of the facts which plaintiffs allege were concealed were, in fact, revealed in various public filings"); Dujardin, 359 F. Supp. 2d at 348 (granting motion to dismiss where public filings disclosed what was allegedly concealed); Sable v. Southmark/Envicon Capital Corp., 819 F. Supp. 324, 333 (S.D.N.Y. 1993) ("The naked assertion of concealment of material facts which is contradicted by published documents which expressly set forth the very facts allegedly concealed is insufficient to constitute actionable fraud.").

Unable credibly to argue that Freddie Mac did not disclose the information that Plaintiff alleges it concealed, Plaintiff once again resorts to third-party commentary in a vain attempt to argue that Freddie Mac concealed information that it plainly and repeatedly disclosed. OB 39. As noted above, such conclusory third-party commentary by political opponents of the GSE's -- which lacks specific supporting facts -- is irrelevant to Plaintiff's claims and cannot trump the disclosures that Plaintiff studiously ignores. See supra Part II.B (citing Hershfang v. Citicorp, 767 F. Supp. 1251 at 1255-56 ("analysts' opinions are neither relevant to this complaint nor admissible, and, even if the analysts' assumptions are true, that can not reasonably lead to an inference that defendants made intentional or reckless misrepresentations to the public at an earlier time") (quotations omitted). Indeed, conclusory allegations have no probative value even if made by a supposed expert on the topic. See, e.g., Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) (expert affidavit had "no probative value" since it contained

[19] Consequently, Plaintiff's citation to a litany of cases standing for the inapposite proposition that, to sustain the "truth-on-the-market" defense, information must be revealed to the market with a "degree of intensity and credibility" gets Plaintiff nowhere. See, e.g., Hall v. Children's Place Retail Stores, Inc., 580 F. Supp. 2d 212, 229 (S.D.N.Y. 2008) (rejecting argument based on "truth-on-the-market" defense); In re Comverse Tech., Inc. Sec. Litig., 543 F. Supp. 2d 134, 150 (E.D.N.Y. 2008) (same); Lapin, 506 F. Supp. 2d at 238 (same); Wieland v. Stone Energy Corp., 2007 U.S. Dist. LEXIS 76636, at *35 (W.D. La. Aug. 17, 2007) (same).

"conclusory allegations without specific supporting facts"). Plaintiff's third-party commentary is no substitute for the specific facts that are missing from the Amended Complaint, and it cannot change the fact that the allegedly omitted information was plainly disclosed.

D. Accurate Statements Of Historical Fact Are Not Actionable.

In its Opposition Brief, Plaintiff does not dispute the proposition that accurate statements of historical fact are not actionable. See MB 51-52. Indeed, Plaintiff's only response to Freddie Mac's argument is the conclusory assertion that Freddie Mac's "rhetoric cannot be taken seriously" because Freddie Mac's "hard data is precisely what Plaintiffs challenge". OB 38. Outside of that one sentence conclusion, Plaintiff offers no specific fact demonstrating precisely how it challenges any single piece of hard financial data that the Company disclosed. The Amended Complaint fails to allege any facts showing that any specific financial disclosure that Freddie Mac made for any financial period -- regarding its subprime loan-backed investments, its capital or any other matter -- was materially inaccurate, let alone by how much. Nor does Plaintiff even attempt to distinguish the law cited in Freddie Mac's Moving Brief holding that claims, like Plaintiff's here, that are premised on accurate statements of historical fact are not cognizable under the securities laws. MB 52.

E. Vague And Indefinite Statements Of Optimism Are Immaterial, As A Matter Of Law.

Plaintiff acknowledges that vague and indefinite statements of optimism are immaterial as a matter of law. OB 40; see also MB 52-53. However, Plaintiff argues that: (1) statements of opinion can be actionable in some instances; and (2) certain challenged statements were not puffery "when taken in context." OB 40-42. Neither of these arguments is persuasive.

Citing Malin v. XL Capital, 499 F. Supp. 2d 117 (D. Conn. 2007), Plaintiff asserts that opinion statements can be actionable if Plaintiff pleads "with particularity that defendants did not sincerely believe the opinion they purported to hold," or if the statements are worded as guarantees or supported by specific statements of fact. OB 40 (emphasis added). As an initial matter, Malin supports dismissal of Plaintiff's claims. There, the court granted defendant's motion to dismiss where plaintiffs' claims were premised on vague statements of optimism. See id. at 145 ("Optimistic statements concerning the future of a company are generally referred to as 'statements of opinion and puffery, and as such, are 'not actionable as a matter of law.'"). Furthermore, as discussed above, Plaintiff here fails adequately to plead any specific facts supporting a strong inference of scienter. See supra Part II.B. Plaintiff does not assert that Defendants did not sincerely believe any of their public statements of opinion. Indeed, the Amended Complaint pleads the opposite -- that from mid 2007 through March 2008, "the Company and its executives believed the abundance of subprime loans in the market in this timeframe presented a significant opportunity for the Company." AC ¶ 103 (emphasis added). Further, Plaintiff does not identify any opinions that were worded as guarantees or were not sincerely held by the speaker.

Plaintiff makes no attempt to distinguish the multitude of authorities in Freddie Mac's Moving Brief holding statements nearly identical to the challenged statements here to be immaterial corporate puffery. MB 52-53. Nonetheless, Plaintiff argues that certain statements were not immaterial puffery when read in context. OB 41-42.[20] Plaintiff's argument is disingenuous at best. As demonstrated above (see supra Part II.A), it is Plaintiff who has plucked statement after statement from their historical and literary context in an effort to suggest that statements were false, when they clearly were not.

For example, Plaintiff does not indicate why statements that Freddie Mac was "strong" and "sound" should be raised from the realm of immaterial puffery to that of material misstatements by virtue of separate and true statements regarding Freddie Mac's corporate purpose. The cases Plaintiff cites for this proposition are inapplicable here because they involve

[20] The cases Plaintiff cites as examples of courts rejecting puffery arguments involved extensive specific facts not present here and, in the case of Countrywide, recognized by the court as extraordinary. See OB 42; see, e.g., Countrywide, 588 F. Supp. 2d at 1144 ("the CAC's allegations present the extraordinary case where a company's essential operations were so at odds with the company's public statements that many statements that would not be recognizable in the vast majority of cases are rendered cognizable to the securities laws. . . . [T]he CAC adequately alleges that Countrywide's practices so departed from its public statements that even 'high quality' became materially false or misleading"), 1153 ("It cannot be emphasized enough that in the vast majority of cases such statements would be nonactionable puffery.").

specific misstatements concerning a company's purpose, not garden variety puffery combined with accurate statements regarding a company's purpose. See In re Moody's Corp. Secs. Litig., 599 F. Supp. 2d 493, 509 (S.D.N.Y. 2009) ("Moody's steadfastly maintained independence as a cornerstone of its business . . . and does not couch this assertion in the language of optimism"); Lapin v. Goldman Sachs, 506 F. Supp. 2d 221, 240 (S.D.N.Y. 2006) (statement that "integrity 'was at the heart' of its business").

Moreover, Plaintiff's contention that puffery is generally not an appropriate basis on which to dismiss a complaint is directly contrary to controlling law in this circuit. OB 40. The overwhelming weight of authority in this circuit holds that cases should be dismissed if they are based on statements of immaterial puffery. See, e.g., MB 52-53; Rombach v. Chang, 355 F.2d 164 (2d Cir. 2004) (affirming dismissal based, inter alia, on a finding that claims were predicated on expressions of puffery and corporate optimism); Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124 (2d Cir. 1994) (same).

F. The PSLRA's Safe Harbor Provision And The "Bespeaks Caution" Doctrine Immunize Forward-Looking Statements Accompanied By Meaningful Cautionary Language.

Plaintiff does not dispute that the "bespeaks caution" doctrine protects certain statements of soft information that bespeak caution in outlook. MB 54-56. Instead, Plaintiff argues that the doctrine does not apply to certain challenged statements because: (1) the question of whether the PSLRA's safe harbor or the bespeaks caution doctrine applies should not be answered on a motion to dismiss; (2) such statements were not forward looking or not accompanied by meaningful cautionary language; or (3) Defendants knew their statements were false when made. OB 42-44. Each of Plaintiff's arguments fails.

Plaintiff's assertion that the PSLRA's safe harbor is "unsuitable" to apply on a motion to dismiss misstates the governing law. The Second Circuit and its constituent courts routinely apply the PSLRA's safe harbor at the motion to dismiss stage to dismiss claims founded upon statements that fall within the aegis of the PSLRA's safe harbor provision. See, e.g., Rombach, 355 F.3d at 175 (affirming grant of motion to dismiss where challenged statements were protected by PSLRA's safe harbor); Halperin v. eBanker USA.COM, Inc., 295 F.3d 352, 357 (2d Cir. 2002) (same); Fort Worth Employers' Retirement Fund v. Biovail Corp., 615 F. Supp. 2d 218 (S.D.N.Y. 2005) (applying PSLRA's safe harbor provision to forward-looking statements at motion to dismiss stage); In re IAC/Interactive Corp. Sec. Litig., 478 F. Supp. 2d 574, 586-587 (S.D.N.Y. 2007) (same); In re Cross Media Mktg. Corp. Sec. Litig., 314 F. Supp. 2d 256, 267 (S.D.N.Y. 2004) (same). The bespeaks caution doctrine, like the safe harbor, has commonly been applied as a basis for granting a motion to dismiss. See, e.g., In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 364 (3d Cir. 1993), cert. denied, 510 U.S. 1178 (1994) (holding, inter alia, that bespeaks caution doctrine rendered immaterial alleged misrepresentations and omissions). Plaintiff offers no relevant citations to the contrary. See OB 42-43 (citing only Seventh Circuit cases).

Plaintiff also argues incorrectly that Defendants' statements were not forward-looking or not accompanied by meaningful cautionary language. OB 43. Plaintiff has cited to literally pages of disclosures, which on their face include forward-looking statements. In addition, asserting only that Freddie Mac's warnings were "[g]eneral," Plaintiff fails to explain which of Freddie Mac's numerous cautionary disclosures were not "meaningful," and why. The steady drumbeat of warnings that Freddie Mac issued during the class period in press releases, presentations, conference calls, and SEC filings were anything but general. See MB at 54 n.55. As discussed in Freddie Mac's Moving Brief, Freddie Mac's Annual Reports set forth in great detail the numerous risks that could affect Freddie Mac's investments and business, as did the many press releases on which Plaintiff relies. MB Part III.A.3. Such warnings immunize Defendants' forward-looking statements from liability. See, e.g., Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 949 F.2d 243, 245-46 (8th Cir. 1991) (holding that a plaintiff cannot "base [its] federal securities fraud claim on any misrepresentation or omission . . . which was addressed by the repeated, specific warnings of significant risk factors and the disclosures of underlying factual assumptions also contained therein"); Biovail Corp., 615 F. Supp. 2d at 232-33 (considering cautionary language in a recent SEC From 20-F/A in holding that the safe harbor immunized from liability alleged misrepresentations in other statements).

Plaintiff attempts to argue that Freddie Mac's cautionary language was not meaningful based on the overused adage that the securities laws provide "no protection to someone who warns his hiking companions to walk slowly because there might be a ditch ahead when he **knows with near certainty** that the Grand Canyon lies one foot away." 335 F.3d at 173 (quoting In re Prudential Sec. Litig. 930 F. Supp. 68, 72 (S.D.N.Y. 1996)) (emphasis added); OB 43. Specifically, Plaintiff advances the unsupported and implausible argument that Freddie Mac itself is responsible for the global credit crisis and, therefore, Freddie Mac's cautionary language specifically warning of the effect that such a crisis would have on its financial results was ineffective. The Amended Complaint, however, contains no specific facts creating a strong inference that **anyone** at Freddie Mac knowingly made a false or misleading statement or omission of material fact, let alone "**knew with near certainty**" that the global credit crisis would cause Freddie Mac to be put into conservatorship.

Plaintiff also cites two cases to support the proposition that the PSLRA's safe harbor does not apply to Defendants' forward-looking statements because the statements allegedly were made with actual knowledge of their alleged falsity. OB 44. As an initial matter, the first prong of the safe harbor applies regardless of any Defendants' state of mind. See, e.g., Miller v. Champion Enters. Inc., 346 F.3d 660, 672 (6th Cir. 2003) (forward-looking statement accompanied by sufficient cautionary language protected regardless of actual state of mind); Harris v. Ivax Corp., 182 F.3d 799, 803 (11th Cir. 1999) (same). In any case, as noted above, Plaintiff has not pled any specific facts to support a strong inference that any defendant made a statement with actual knowledge of its falsity. See supra Part II.B. For this reason, as in the two cases cited by Plaintiff, this Court should dismiss Plaintiff's claims. See, e.g., In re NovaGold Res. Inc., 629 F. Supp. 2d at 291-295 (granting motion to dismiss claims predicated on forward-looking statements protected by the PSLRA's safe harbor); In re Blockbuster Inc. Sec. Litig., No. 03-0398, 2004 U.S. Dist. LEXIS 7173, at *13-19 (N.D. Tex. Apr. 26, 2004) (dismissing, with prejudice, claims premised on forward-looking statements that referenced risk factors disclosed in defendant's annual report).[21]

CONCLUSION

For all of the foregoing reasons, as well as all of the reasons noted in Freddie Mac's Moving Brief, the Amended Complaint should be dismissed, with prejudice.

Respectfully submitted,

BINGHAM McCUTCHEN LLP

/s/ Jordan D. Hershman
Jordan D. Hershman
Jason D. Frank (admitted *pro hac vice)*
One Federal Street
Boston, MA 02110-1726
Tel: (617) 951-8455
Fax: (617) 951-8736
jordan.hershman@bingham.com
jason.frank@bingham.com

Kenneth I. Schacter
399 Park Avenue
New York, New York 10022-4689
Tel: (212) 705-7487
Fax: (212) 702-3622
kenneth.schacter@bingham.com

Attorneys for Defendant Federal Home Loan Mortgage Corporation

OF COUNSEL:

Hyacinth Kucik
Lance J. Wolf
Howard Lindenberg
Freddie Mac
8200 Jones Branch Drive
McLean, Virginia 22102
Tel: (703) 903-2000
Fax: (703) 903-2485

Attorneys for Defendant Federal Home Loan Mortgage Corporation

Dated: February 24, 2010

A/73300587.3

[21] Plaintiff's reliance on Hall v. Children's Place Retail Stores, Inc. is also misplaced. 580 F. Supp. 2d 212 (S.D.N.Y. 2008); OB 44. Hall is factually inapposite. In Hall, unlike here, the defendant: (1) admitted that it backdated stock option grants; (2) admitted that many options were "spring-loaded," i.e., backdated just before a sharp increase in defendant's stock price; (3) admitted that it violated relevant accounting rules; (4) failed to disclose multiple violations of a licensing agreement that was key to its business; and (4) restated its financial results, which were materially misstated in violation of GAAP. Id. at 221-23. In light of these facts, none of which is present here, the court held that certain risks identified in the defendant's forward-looking statements had already become reality at the time the defendant made the statements and, therefore, the PSLRA's safe harbor did not apply. Id. at 229.